Office-Supreme Court, U.S.
FILED
JUN 21 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 227

ANTONIO CORALLO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MICHAEL P. DIRENZO
253 Broadway
New York 7, N. Y.
Counsel for Petitioner

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	6
Conclusion	13
Appendix A—Opinion of the United States Court of Appeals	1a
Appendix B—Judgment of the United States Court of Appeals	54a
Appendix C—Opinion on Petitions for Rehearing	56a
Appendix D—Constitutional Amendments, Statutes and Rule Involved	59a

AUTHORITIES CITED

Cases

Bollenbach v. United States, 326 U. S. 607	11
DiBonaventura v. United States, 15 F. 2d 494 (4th Cir. 1926)	13
Direct Sales Co. v. United States, 319 U. S. 703	12-13
Falcone v. United States, 311 U. S. 205	13
Gold v. United States, 352 U. S. 987	6, 7, 8
Irwin v. Dowd, 366 U. S. 717	10
Marshall v. United States, 360 U. S. 310	10
Mattox v. United States, 146 U. S. 140	8

PAGE

Remmer v. United States, 347 U. S. 227 ..... 6, 7, 8
Remmer v. United States, 350 U. S. 377 ..... 6, 8, 9

Stirone v. United States, 361 U. S. 212 12

United States v. Bufalino, 285 F. 2d 408 (2d Cir. 1960) 13
United States v. Dellaro, 99 F. 2d 781 (2d Cir. 1938) 13
United States v. Socony-Vacuum Oil Co., 310 U. S. 150 10

Van Huss v. United States, 197 F. 2d 120 (10th Cir. 1952) 13

Young v. United States, 214 F. 2d 232 (D. C. Cir. 1954) 10, 11

United States Constitution

Fifth Amendment 2, 3
Sixth Amendment 2, 3

Statutes

Title 18, U. S. Code:
Section 371 ..... 2, 3
Section 1503 ..... 2, 3

Federal Rules of Criminal Procedure

Rule 52(g) 2, 11

Miscellaneous

Arens, Conspiracy Revisited, 3 Buffalo L. Rev. 242 (1954) 13
The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656 (1963) 10
3 Wigmore on Evidence (3d ed.) § 906 10

IN THE

Supreme Court of the United States

October Term, 1962

No.

ANTONIO CORALLO, *Petitioner,*

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Antonio Coralló, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 25, 1963.

Opinion Below

The opinions of the Court of Appeals, printed in Appendix A, *infra*, pages 1a-53a, and Appendix C, *infra*, pages 56a-58a, not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 25, 1963 (Appendix B, *infra*, pages 54a-55a), and a

timely petition for rehearing was denied on May 27, 1963 (Appendix C, *infra*, pages 56a-58a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the questioning by news reporters of the jury during the period of its deliberations is presumptively prejudicial to the petitioner.

2. Whether it was prejudicial error for the trial court to inform the jury in its charge what a witness had testified before the grand jury.

3. Whether the evidence is sufficient to support the verdict against the petitioner.

Statutes Involved

The relevant constitutional, statutory and regulatory provisions are printed in Appendix D, *infra*, pages 59a-60a. They are the Fifth and Sixth Amendments to the United States Constitution; Sections 371 and 1503, Title 18, U.S.C.; and Rule 52(b), Federal Rules of Criminal Procedures.

Statement

Following a jury trial, petitioner was convicted in the United States District Court for the Southern District of New York upon a one-count indictment. The indictment charged that petitioner, Elliott Kahaner, Robert M. Erdman, James Vincent Keogh and Sanford J. Moore, named defendants, and others named as co-conspirators but not

as defendants, conspired (18 U.S.C. § 371) to commit an offense against the United States, i.e., to corruptly influence, obstruct and impede the due administration of justice, or endeavor to do so, in the United States District Court for the Eastern District of New York, in violation of 18 U.S.C. § 1503. Petitioner was sentenced to a term of two years' imprisonment.

The case to which the alleged conspiracy was directed concerned the alleged criminal concealment of the assets of Gibraltar Amusements, Ltd., by Moore and others.

The trial of Erdman and Moore was severed and petitioner was tried together with Kahaner and Keogh. Kahaner had served as Chief Assistant United States Attorney and later as Acting United States Attorney for the Eastern District of New York. Keogh was a Justice of the Supreme Court of New York for Kings County.

The trial of this case commenced before the jury on May 14, 1962. The cause was committed to the jury at about 3:50 o'clock P.M. on June 14 (R. 426a).* The jury recessed after 12:30 o'clock A.M. on June 15, and resumed deliberations at about 10:15 o'clock A.M. on June 15. On the afternoon of June 15, one of counsel for the defendants brought to the attention of the court (R. 436a-439a) that the jurors were subjected to television camera men, photographers and the press; that photographs were being taken and newspapermen had been running along beside the jury asking questions. The trial judge remarked that he had used a side entrance, which he had opened specially for himself to avoid the

* References are to the petitioner's Appendix filed in the court below, unless otherwise stated.

"television people" who were still there at a quarter to one in the morning (R. 437a). The prosecutor stated that the jury must work its way through the sea of reporters and that a few had asked questions (R. 438a). The trial judge recognized that the jury was entitled to protection, but did not know what he could do about it (R. 439a).

The jury deliberated further until about 10:40 o'clock P.M. on June 15, when it delivered a note to the trial judge which read: "Your Honor, we find it impossible to come to an agreement." (Exhibit C). This note was not seen by counsel for the defendants. However, the trial judge further charged the jury commencing with the words: "Members of the jury, I have a note from you in which you suggest that you desire to discontinue your efforts," and then followed with a set of instructions which included a quotation of the "Allen" charge (R. 443a-445a).

At the conclusion of this further charge, it was again brought to the Court's attention by one of the defense counsel that the incidents previously pointed out with respect to the activity of the press and television people were continuing and that reporters had been "pouring questions at jurors"—last night, today at lunch, and tonight at dinner (R. 447a-448a). A motion for mistrial based upon this activity the action of the court in holding the jury and its further charge, the exhaustion of the jury, and the lack of fair judgment to be obtained, was joined by all counsel for defendants (R. 447a-448a). The motion was denied.

Thereafter, the jury continued its deliberations commencing 8:50 o'clock A.M. June 16. Among other things,

at 3:20 o'clock P.M., the jury requested that the "Allen" charge be read again. At about 7:00 o'clock P.M., on June 16, the jury returned verdicts of guilty.

In the course of the trial, at the conclusion of the cross-examination of Moore on behalf of Corallo, the Government pleaded surprise (R. 195a). The court rejected the suggestion that it hear preliminarily whether the Government had been told by the witness prior to trial what his testimony would be (R. 195a-205a). Over repeated objection the Government was permitted to cross-examine Moore and to read aloud answers previously given by him before the grand jury (R. 209a-231a). Moore repeated that just prior to trial he, together with his attorney, had advised the Government what his testimony would be if called (R. 213a, 236a-237a). At the conclusion of the examination of Moore, the court instructed the jury that the only evidence in the case is what is heard from the witness' lips, and that any evidence elicited from Moore concerning his prior testimony before the grand jury is not to be treated as affirmative proof, but only as to the issue of credibility (R. 238a). However, subsequently, in its charge to the jury the trial court referred to a meeting between Erdman, Corallo and Kahaner, which Erdman said occurred in March but Moore said occurred in April; in this connection, the court specifically pointed out to the jury that Moore had acknowledged before the grand jury that Corallo asked Kahaner to keep Moore on the street, whereas at the trial Moore testified he had no recollection. Although the court told the jury it would again refer to "this matter," it did not do so (R. 369a).

The court below affirmed petitioner's conviction.

With respect to the interference with the jury by newsmen, the court below stated that although it did not take such interference lightly "there was nothing to indicate that the fleeting remarks of the newsmen, whatever they were, would have frightened or overawed a juror." (Appendix A, *infra*, p. 48a). With respect to the trial judge's charge on the grand jury testimony of the witness Moore, the court referred to an instruction by the trial judge in the course of the trial, omitting to note that that instruction was vitiated by the final charge to the jury. The court below stated that the trial judge conformed to the "judicially sanctioned ritual," but conceded that the petitioner was realistic in asserting that the grand jury testimony was utilized as evidence in the case. (Appendix A, *infra*, pp. 27a-28a). The court below rejected petitioner's contention that the evidence did not support his conviction by observing briefly in a footnote that "its outline [of the evidence] may not have shown this [the sufficiency of the evidence] with respect to Corallo, who, on the Government's evidence, was an adviser, or perhaps a stimulator, and a temporary holder of some of the funds." Appendix A, *infra*, p. 13, note 4).

Reasons for Granting the Writ

1. This case presents a substantial inroad upon the integrity of the jury function in federal criminal prosecutions. Petitioner submits that the intrusions upon the privacy of the jury sanctioned by the court below are clearly contrary to the standards of fair trial and the requirements of proper judicial administration set forth in *Remmer* v. *United States*, 347 U. S. 227; *Remmer* v. *United States*, 350 U. S. 377; and *Gold* v. *United States*, 352 U. S. 987.

(a) This Court, in *Remmer* v. *United States*, 347 U. S., at page 229, held that "In a criminal case, any private communication, [or] contact . . . with a juror . . . . is, for obvious reasons, deemed presumptively prejudicial . . ." Here, the jurors were repeatedly required to run the gauntlet of a sea of reporters, radio and television men, and photographers, some of whom ran along with the jurors and questioned them. Surely this is unauthorized contact no less offensive than in *Remmer* or in *Gold* v. *United States*, *supra*. It was for the trial court, on being informed of the improper intrusions (as it was on two occasions) upon the sanctity of the jury at the most critical stage of the proceedings, to take immediate and effective measures to avert the repetition. More important, it was for the trial court to take immediate steps to confirm or rebut the presumption of prejudice which accompanies "any private communication, [or] contact . . . with a juror." Instead, the trial court indulged in a contrary presumption, albeit recognizing that a serious situation existed and that the jury should not be subjected to such treatment. The Court of Appeals also rejected the presumption of prejudice as an inapplicable principle. It adopted a contrary standard, stating that "there was nothing to indicate that the fleeting remarks of the newsmen, whatever they were, would have frightened or overawed a juror." The record, however, does not suggest mere "fleeting remarks", and since the Court, by admission, did not know what was said, its assumption that a juror would not have been overawed or frightened is unwarranted. The admonition of the court below as to stern measures to be taken in the future does not cure what happened in this case.

(b) The *Remmer* cases involved a transparent interference with the privacy of a single juror by an attempt to influence him, then treated by the court and subsequently by the government agents as "meaningless." The *Gold* case involved an unintentional intrusion upon the privacy of a few jurors by questions of federal agents on a collateral subject. Here, all the jurors were subjected to the coercive pressure of a highly active and charged atmosphere, with questions thrown at them by representatives of public news media. Therefore, the attempt of the court below to distinguish the *Remmer* opinions of this Court and to restrict them to their actual facts utterly fails to cover the obvious and flagrant violation of the principle for which those cases stand and which has been the law at least since *Mattox* v. *United States*, 146 U. S. 140, 150. There, the standard was declared that "Private communications possibly prejudicial, between jurors and third persons . . . are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear."

(c) The assumption of the court below that nothing overawed or frightened the jurors does more than fly in the face of this Court's pronouncements and assume a standard in principle positively rejected by this Court. It contradicts the record. The jury was subjected to severe pressure to reach a verdict. It has its own problems: a note to the trial court that it was impossible to agree was rejected. At the most critical stage of the trial, the physical pressure of public interest in the form of a sea of newsmen, which could hardly be put out of mind, and the questioning or remarks by the newsmen, constituted an unusual and severe strain. Even if the standard were that

a juror must be overawed or frightened, and there is no such authority cited by the court below, the record here discloses sufficient evidence of coercive, awesome and frightening circumstances to have impelled the court below to insist upon careful inquiry to affirmatively establish the absence of prejudice. Since the prosecutor agreed, in the first instance, as to the conditions which existed, it comes with ill grace for the Government to minimize the influence and effect upon the jury. Certainly, the jurors were "subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the jury's right to operate as freely as possible from outside intrusions purposefully made." *Remmer* v. *United States*, 350 U. S., at page 382. Moreover, that unauthorized communication and contact were had with the jurors stands admitted on the record.

(d) A presumption of prejudice arose in this case, as it does whenever a juror receives a private communication bearing even remotely on the trial, or whenever the calm and deliberate atmosphere in which a jury should be free to operate is disturbed. The presumption cannot be destroyed by the patently inappropriate assumptions and inferences indulged in by the court below in lieu of a prompt inquiry to establish the absence of prejudice. Here, the plain marking of the record points to a deprivation of due process in contravention of the Fifth and Sixth Amendments to the federal constitution, and to a straying from the standards of fair and proper administration of criminal justice declared by this Court. The constitutional privilege of the press cannot be permitted to infringe upon the constitutional safeguards to the fair administration of

criminal justice. *Cf. Marshall* v. *United States*, 360 U. S. 310; *Irwin* v. *Dowd*, 366 U. S. 717. Furthermore, this Court's "supervisory authority over the administration of criminal justice in the federal courts" should be here invoked. See, Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656 (1963).

2. This case presents a disturbing variation from settled trial procedure with respect to the use of the grand jury testimony of a witness.

(a) The Government called the co-defendant and alleged co-conspirator, Moore, as part of its case in chief. When Moore's testimony did not appeal to the prosecutor—whose initial claim to surprise was rebutted by the testimony of the witness of his pre-trial discussion with the prosecutor—the trial court improperly permitted the prosecutor first to adduce Moore's grand jury testimony before the jury under the subterfuge of refreshing his recollection and then to cross-examine him. This is directly contrary to the holding of this Court in *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234. See also, *Young* v. *United States*, 214 F. 2d 232, 237-239 (D. C. Cir. 1954).

(b) Moreover, the settled rule is that even where a prior statement is used to impeach, it is solely to affect credibility; it is neither admissible nor can it be considered as support for the truth of its contents. 3 Wigmore on Evidence (3d ed.) § 966. But here, in its charge to the jury, the trial court specifically referred to Moore's grand jury testimony with respect to petitioner without qualification as evidence in the case in support of the truth of its

contents (R. 369a).[1] This was fundamental error. *Young* v. *United States*, *supra*; Rule 52(b), Fed. Rules Crim. Pro.

The court below referred to the earlier advice by the trial judge during the trial as to the use of the grand jury testimony on the issue of credibility. But this occurred long before the case was submitted to the jury, and was contradicted by the charge to the jury, which the jury is expected to remember and to apply. "Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach* v. *United States*, 326 U. S. 607, 613.

It is indeed strange that the court below, which rejected other arguments of the defendants based on occurrences as recent as a day or two of the jury verdict on the ground that they were too remote for an appreciable effect to remain, in this instance gave preferred treatment to a more remote instruction which was actually countermanded by the trial judge in his charge. It is submitted that the jury either followed the charge, which was fundamentally erroneous, or, if it recalled the earlier instruction, it could only have been confused.

---

1. The court charged the jury as follows: "The Government, in further support of the claimed conspiracy, offered evidence through Erdman that about the middle of March he and Corallo conferred with Kahaner outside the Brooklyn Federal Building, that according to Erdman, Corallo said to Kahaner, with respect to Moore, 'This boy is important to me, keep him off the street.' As to this item, the defendant Moore, who, although nearby, did not participate in the meeting, which he places at the end of April, acknowledged that before the grand jury he had testified that when Corallo later had coffee with him, he, Corallo said he did ask Kahaner to keep Moore off the street. However, at this trial, Moore testified he had no recollection thereof. I shall again refer to this matter."

(c) The court below in effect suggested that it was perfectly proper to ask the jury to accept Moore's grand jury testimony rather than what he said at the trial. In this suggestion, the court confessedly was indifferent to the accepted and settled law. The excuse that the trial court at least conformed to "judicially sanctioned ritual" is at variance with the facts of record.

3. If certiorari is granted in this case, petitioner desires to argue an additional question, here summarily set forth.

Petitioner submits that the evidence is inadequate to establish an offense within the indictment against him. The government presented two witnesses against the petitioner, one of whom, on cross-examination completely vindicated him. The indictment contained only two factual allegations to connect the petitioner to the alleged conspiracy: first, that he, Moore and Forman obtained and delivered $35,000. to Erdman (Paragraph 4E; R. 17a), and second, that he and Kahaner caused Erdman to communicate with Keogh (Paragraph 4F; R. 17a). There was no evidence to support either. Nor was there any evidence of any overt act stated in the indictment against petitioner.

Ignoring such decisions as *Stirone* v. *United States*, 361 U. S. 212, the court below disposed of petitioner with a footnote which clearly reveals that it failed to distinguish between mere knowledge and acquiescence on the one hand and conspiracy on the other. This court has frequently observed the misuses of the conspiracy indictment, and has found it necessary to prevent a miscarriage of justice in marking its boundary lines: *Direct Sales Co.*

v. *United States*, 319 U. S. 703; *Falcone* v. *United States*, 311 U. S. 205.

Meticulous care is required in deciding whether a sufficient case of conspiracy has been made out. See *United States* v. *Bufalino*, 285 F. 2d 408, 418 (2d Cir. 1960); Arens, *Conspiracy Revisited*, 3 Buffalo L. Rev. 242 (1954).

Accordingly, the decision below is also in conflict with the decisions which establish that conspiracy requires that the accused affirmatively unite himself and agree to take part in the project; that there must be intentional participation with a view to furtherance of the common design; and that the accused perform affirmative acts to promote attainment of the objective of the conspiracy. *DiBonaventura* v. *United States*, 15 F. 2d 494, 495 (4th Cir. 1926); *United States* v. *Dellaro*, 99 F. 2d 781, 783 (2d Cir. 1938); *Van Huss* v. *United States*, 197 F. 2d 120, 121 (10th Cir. 1952).

4. Petitioner adopts, without repeating, the reasons where applicable, for granting the writ advanced by his co-defendants in their petitions for a Writ of Certiorari to review the decision of the court below.

CONCLUSION

For the reasons stated, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL P. DIRENZO
Counsel for Petitioner,
Antonio Corallo

June , 1963

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 253—October Term, 1962

(Argued March 8, 1963 Decided April 25, 1963)

Docket No. 27784

UNITED STATES OF AMERICA,

Appellee,

v.

ELLIOTT KAHANER, ANTONIO CORALLO and JAMES VINCENT KEOGH,

Appellants.

Before:

CLARK, WATERMAN and FRIENDLY, *Circuit Judges.*

Appeal from a judgment of the District Court for the Southern District of New York, Edward Weinfeld, Judge, in which defendants were convicted, on a jury verdict, for conspiring to violate 18 U. S. C. § 1503. Affirmed.

MURRAY I. GURFEIN (John P. McGrath) (Henry G. Singer, Orrin G. Judd, Jacob W. Heller, of Counsel), New York, New York, *for Appellant, James Vincent Keogh.*

WILLIAM W. KLEINMAN (William W. Kleinman and Eugene Gold), Brooklyn, New York, *for Appellant, Elliott Kahaner.*

MICHAEL P. DIRENZO, New York, New York, *for Appellant, Antonio Corallo.*

WILLIAM G. HUNDLEY and JOHN F. LALLY, Attorneys, Department of Justice (Robert M. Morgenthau, United States Attorney for the Southern District of New York), (Nathan Lewin, Walter T. Barnes, Philip T. White, Attorneys, Department of Justice, on brief), *for Appellee.*

FRIENDLY, *Circuit Judge:*

Elliott Kahaner, Antonio Corallo and James Vincent Keogh appeal from a judgment of conviction in the District Court for the Southern District of New York upon a verdict after a jury trial, presided over by Judge Weinfeld. The indictment charged that they, Robert M. Erdman and Sanford J. Moore conspired with each other and with six co-conspirators corruptly to influence, obstruct or impede the due administration of justice or to endeavor to do so, in violation of 18 U. S. C. § 1503. The case to which the alleged conspiracy was directed was a charge that Moore and other officers or employees of Gibraltor Amusements, Ltd., had been guilty of criminal concealment of assets in that firm's bankruptcy proceeding in the Eastern District of New York; various overt acts were placed in the Southern District. Trial of Erdman and Moore, the Government's principal witnesses against the three appellants, was severed.

The indictment and trial in this case attracted particular attention because of the identity of two of the appellants—Keogh, a widely known and respected Justice of the Supreme Court of New York for Kings County, and Kahaner, who had served as Chief Assistant United States Attorney and later Acting United States Attorney for the Eastern District. No suggestion has ever been made that the due administration of justice was in fact obstructed; the evidence does not reflect in the slightest degree on former Assistant United States Attorney Averill M. Williams, who was in direct charge of the prosecution in the Eastern District or on Judge Leo F. Rayfiel, before whom Moore and the other defendants in that prosecution came for sentencing.

On January 5, 1961,[1] Sanford J. Moore, Sherwood Schwach, Allen Kerner, Alvin Needleman, Jacob Walter Cohen, and Abraham Manacher were arrested in the Eastern District on charges of concealing assets from the trustee in bankruptcy of Gibraltor Amusements, Ltd., a juke box enterpris on Long Island of which Moore had been vice president and principal officer, and the others had been officers or employees. Cohen, who had been a relatively minor employee, had a cousin, Seymour Deutsch, who did accounting work for Dr. Robert Erdman, a Manhattan physician. At the instance of Deutsch and later of Cohen, Erdman communicated some time in January with Kahaner, then Chief Assistant United States Attorney for the Eastern District, who was both a patient and a friend. At

1 All dates in this opinion are in 1961, when the conspiracy is claimed to have occurred and was later investigated, except in Part III where the dates relate to the trial in 1962.

this point the evidence diverges. The following statement is drawn from the Government's case, which was based mainly on the testimony of Erdman and Moore—concededly interested witnesses—who received in return for their cooperation not only postponements of trial on their own indictments here but, in Moore's case, a reduction from three years to one in his sentence on the bankruptcy charge.

The Government's claim was that, following the first conversation between Erdman and Kahaner, a plan was devised whereby Kahaner would endeavor to arrange that only two or at most three of the persons arrested would be indicted (these not to include Cohen), and that later, after Kahaner found that the Assistant United States Attorney proposed to seek the indictment of three—Moore, Kerner and Schwach—the plan was broadened, so that, in Erdman's words, Kahaner "would see to it that they [i.e., the men to be indicted] were treated softly by having the case brought before a specific judge in April, for which he [Kahaner] wanted $35,000". After some hesitation Moore accepted the proposal, in part at the urging of Corallo, with the understanding that $15,000 was to be paid before sentencing, and that Corallo would hold the remaining $20,000 until thereafter. Moore and Kahaner first met in Erdman's office on February 21 [2] and Kahaner was paid $5,000 a day or two later. Shortly thereafter Kahaner told Erdman "pressures" were being applied against

2 This was Erdman's testimony; Moore testified he did not meet Kahaner until March 29. Although Kahaner was in Dr. Erdman's office on February 21, he testified that he was there with a Dr. Feldman, who was to be examined by Dr. Erdman, that he did not see Moore there, and that he was never out of Dr. Feldman's presence, as Dr. Feldman also testified.

Moore because of the latter's unsavory background, and suggested that Erdman see Justice Keogh of the New York Supreme Court for Kings County, and enlist his aid. Around the end of the month Erdman went to the chambers of the Justice, who, according to Erdman's testimony, undertook to be of assistance for a monetary consideration, indicating his financial needs on a card he handed to Erdman, later supplemented by a second one, and also talking of a new car. Erdman testified that Kahaner advised him early in March that owing to a change in the assignments of the judges in the Eastern District, the schedule would have to be accelerated so that sentencing would occur in March, and that around March 7 another $5,000 supplied by Moore was paid to Kahaner and the same amount to Justice Keogh. It is established that, on March 9, Moore, Kerner and Schwach appeared before Judge Rayfiel and pleaded guilty, their attorney, Becker, stating that this was against his advice;[3] the sentencing was set for March 30, on which day Judge Rayfiel would still be presiding.

The Government's case, still resting basically on Erdman's and Moore's testimony, continued with a meeting of Kahaner, Moore and Corallo on March 15, at which Corallo emphasized the importance to him of Moore's not being

3 Becker also testified that he first learned of his clients' intention to plead guilty when he met them outside the courtroom that morning. Assistant United States Attorney Williams testified that a few days earlier Kahaner had informed him that Moore, Schwach and Kerner would plead guilty and, when Williams expressed disbelief, "indicated to me again that they would plead guilty and that they would probably be sentenced by Judge Rayfiel." Kahaner acknowledged telling Williams of the prospective plea; he said this information had come from Dr. Erdman when he was in the latter's office as a patient.

sent to prison; a demand by Kahaner for the balance of the money; a meeting of Erdman, Moore and Kahaner at a Brooklyn coffee shop in the morning of March 29 at which Kahaner was paid an additional $2,500, followed by Erdman's going alone to Justice Keogh's chambers, paying him $17,500 and reminding him that the sentencing was scheduled for the following day; and a telephone call in Erdman's presence from the Justice to Judge Rayfiel arranging to lunch that day and asking that Judge Rayfiel bring with him the probation report on Moore.

Kahaner and Keogh categorically denied everything relating to them which is recited in the two foregoing paragraphs, with the exceptions indicated in notes 2 and 3 as to Kahaner and the following exceptions as to Keogh: The Justice conceded handing Erdman two cards, the first card being an estimate of the costs of renovating his summer home and the second, on his testimony, a request for a loan, but placed the date well after the sentencing and explained these as innocent indications of his financial situation given to a close personal friend. He further agreed that Erdman had come to his chambers on the morning of March 29, but said Erdman was accompanied by Moore and another man. The Justice's testimony was that Erdman introduced Moore as a lifelong friend who was in trouble, and wondered whether the Justice would ask Judge Rayfiel to look at Moore's "background to see whether consideration can be given to him." He thereupon made the telephone call arranging to lunch with Judge Rayfiel, although he denied asking Judge Rayfiel to bring along the probation report on Moore—a point on which his

account was corroborated, and Erdman's contradicted, by Judge Rayfiel. At lunch, Keogh brought up the Moore case whereupon Judge Rayfiel said, in Keogh's words, "that Moore was the most culpable, he was the worst offender in a bankruptcy fraud, the like of which he had not run into before, and that he could—whether background or anything else was considered—he could not consider him anything but a very unsavory character," and also that two other federal judges had alerted him of rumors "that everything has been taken care of" in regard to the Moore sentence. Erdman was told of this conversation by Keogh during the afternoon of March 29. It is not disputed that Erdman then informed Moore, who that evening told his attorney, Becker, that he wanted to withdraw his guilty plea.

Justice Keogh also conceded that at Erdman's request he arranged for Erdman to see Judge Rayfiel on the morning of March 30 before the latter ascended the bench to sentence Moore and his co-defendants. Judge Rayfiel said that no leniency could be extended. The stenographic transcript shows that when Moore, Kerner and Schwach appeared in court, Becker moved for leave to withdraw their guilty pleas, whereupon Judge Rayfiel remarked that this was "shall I say, very palpable, and I am sure that you know just what I mean"; that after some colloquy, during which Assistant United States Attorney Williams opposed withdrawal of the pleas, the case was placed at the bottom of the sentencing calendar; that a conference was then had in chambers during which Judge Rayfiel said to Becker, among other things, that he believed he had "more information that you have with respect to certain phases of this matter"; and that, on return to open court,

the motion for leave to withdraw the pleas of guilty was denied, and Moore, Schwach and Kerner were sentenced for terms of three years, two years and fifteen months respectively.

Beyond this assured core of fact as to what transpired between the lunch of March 29 and the sentencing on March 30 lie great areas of controversy. There is a sharp conflict whether or not the account given by Keogh to Erdman included the prospective sentences, Erdman and Moore saying that it had and Keogh denying this, a denial supported by Judge Rayfiel's testimony that he had not imparted this information to Keogh. There is likewise conflict whether the appointment for Erdman to see Judge Rayfiel was made by Justice Keogh in the afternoon of March 29, as Erdman asserted, or on the morning of March 30, as Justice Keogh and Judge Rayfiel testified. Moreover, Erdman, and Becker as well, testified that *after* Erdman's interview with Judge Rayfiel early on March 30 they went to the chambers of Justice Keogh; Erdman testified that he reported his lack of success with Judge Rayfiel and asked Keogh to call the Judge again, whereupon, according to Erdman, Keogh picked up the telephone and apparently did so; Becker, who said he was excused from the room for most of the time that Keogh and Erdman were talking, testified that while he was inside it, Keogh told Erdman, "Go see him again." Erdman and Becker testified that they then returned to the Federal Building where, according to Erdman, he visited Kahaner and accompanied the latter to Judge Rayfiel's chambers, which Kahaner entered, saying he would ask the judge's secretary to tell the judge that the Government would not oppose

withdrawal of the guilty plea and saying also he would tell Assistant United States Attorney Williams not to fight the withdrawal. This version was corroborated to some extent by Moore but was rather inconsistent with Becker's testimony that after this visit to Judge Rayfiel's chambers, Erdman said "Please don't make a motion to withdraw the pleas." Kahaner denied going to Judge Rayfiel's chambers or otherwise participating in the events of the morning of March 30; and Justice Keogh denied any participation save for then calling Judge Rayfiel for an appointment for Erdman, at the latter's request and in Becker's presence—this being the only call made by him to that end.

According to Erdman and Moore, there were several meetings of the defendants in April, in the course of which Kahaner, among other things, suggested that the situation might still be saved or at least ameliorated by an offer of restitution from Moore. Justice Keogh and Kahaner agreed that they lunched with Erdman on April 5, but testified this meeting had been arranged before the sentencing—a fact substantiated by Kahaner's telephone record—for the purpose of enlisting the Justice's aid in a project to have Kahaner continue for some time under the newly appointed United States Attorney, and that Moore's case was not discussed. The concededly disinterested testimony of Joseph Jaspan, the attorney for the trustee in bankruptcy of Gibraltor Amusements, Inc., provides a thread through the events of April and May. Jaspan was in Justice Keogh's court trying a case the latter part of April, saw Moore sitting there, and approached him during a recess. Moore said he was about to apply for a reduction

in sentence and was prepared to pay in restitution $50,000 in notes endorsed by Erdman; he asked whether if such payment was made, Jaspan or the trustee, M. Hallsted Christ, "would go to Judge Rayfiel and make a plea for him." After further discussion with Moore on April 27, Jaspan was back in Justice Keogh's court on this other matter early in May; the Justice called him to the side-bar and inquired as to "what was happening" in the Gibraltor case, saying that Erdman was his physician and friend. Later the Justice's office requested Jaspan to attend a meeting in chambers on May 22; upon arriving there, Jaspan found, in addition to the Justice, Moore and Erdman, whom the Justice introduced, and Louis Forman, a business associate of Moore's. The Justice inquired what was happening in regard to the proposed settlement in Moore's case. Jaspan answered that the trustee was prepared to recommend acceptance of $50,000 in notes endorsed by Erdman, but that he "had no way of knowing whether this would help them in the matter before Judge Rayfiel," and that the offer must not be conditioned on a reduction of sentence, with Justice Keogh also emphasizing this. On May 31, Moore, whose application for a stay pending petition for certiorari from our affirmance of Judge Rayfiel's order denying leave to withdraw his guilty plea, 290 F. 2d 501, had just been denied, delivered to Jaspan a check signed by Erdman for $1,000, and a series of notes, twenty-four for $1,000 and one for $25,000, made by Moore and endorsed by Erdman; he asked Jaspan to inform Judge Rayfiel of this. After an unsuccessful attempt to communicate with Williams, who, it was learned, had severed his connection with the United States Attorney's office, Jaspan called

Judge Rayfiel for an appointment; the Judge was willing to make one only if a representative of the United States Attorney was present, and suggested that Jaspan call Kahaner, the Chief Assistant. After being referred by Kahaner to Kreindler, the chief of the Criminal Division, without result, Jaspan again called Kahaner, who agreed to attend, and also Becker, who had prepared the offer of restitution. When the three lawyers appeared before Judge Rayfiel that afternoon, Becker said he intended to apply for a reduction of sentence because of the restitution and wished to know whether an oral application would be entertained; Judge Rayfiel said it would. Kahaner raised the point that a petition for certiorari to review this Court's affirmance of the adjudication in bankruptcy, *In re Gibraltor Amusements, Ltd.*, 291 F. 2d 22 (2 Cir.), cert. denied, 368 U. S. 925 (1961), was pending, and questioned whether the application for a reduction of sentence should be entertained unless the petition were withdrawn. The Judge said that the defendants should surrender on the following Monday as scheduled, but indicated that he would then continue bail pending a hearing on the application for reduction of sentence.

To the framework afforded by Jaspan's evidence, Erdman and Moore annexed much testimony as to markedly greater interest and participation by Justice Keogh in the settlement negotiations. In particular they claimed he had reviewed a draft of the settlement offer and insisted on eliminating a condition as to reduction of sentence but with a remark indicative of further conversations with Judge Rayfiel that would make this damaging to Keogh rather than the reverse. Justice Keogh, while conceding

that he had a discussion with Jaspan at side-bar and that a meeting was had in his chambers on May 22, denied participating in the meeting, making any remark about Judge Rayfiel or ever seeing the latter; to the extent that he conceded taking some interest in the settlement negotiations, he attributed this to his friendship with Erdman. Kahaner denied any participation save the telephone calls from Jaspan and his appearance before Judge Rayfiel on May 31. Corallo was not implicated in this phase of the alleged conspiracy.

The foregoing account, rather long as it has turned out to be, is skeletonized in the extreme and is intended only to afford the background needed for understanding the points raised on this appeal. Moreover, the summary leans in the Government's direction, since on appeal from a jury's verdict in a criminal case we must, in considering the evidence, take "the view most favorable to the Government", *Glasser* v. *United States*, 315 U. S. 60, 80 (1942). Thus our outline has not included much evidence adduced by defendants, which tended to discredit Erdman's and Moore's testimony in essential respects, although some of this will be mentioned below.

Every criminal case imposes special responsibilities on judges. These are enhanced when there is a sharp conflict in the evidence and the Government's case depends in large part on the testimony of persons who admit guilt of the crime with which the other defendants are charged. The responsibilities become greater still when the case threatens the deprivation of life or, as here, imperils much that makes life worth while—in one instance a reputation built over 37 years of public service and culminating in judicial office,

and in another a young lawyer's promising career. Yet we must say also that the offense here charged—an attempt to interfere with the administration of justice—strikes at the very foundation of government, and that the high position in the community held by one of the defendants, and the role of another as a federal prosecutor, would aggravate the offense—if it occurred. The institutional arrangement of power made by our Constitution leaves such awesome questions of guilt to be determined, not by trial or appellate judges, but by a jury of laymen, with the Government having the appropriately heavy burden of convincing twelve men or women of the guilt of each defendant beyond a reasonable doubt. If the evidence was sufficient to warrant submission to the jury, it is not for judges "to weigh the evidence or to determine the credibility of witnesses", *Glasser* v. *United States*, *supra*, 315 U. S. at 80; our task, once we find that condition satisfied, is the more limited one of determining whether errors prejudicial to the defendants occurred at the trial. Even the bare outline we have given shows that the evidence was sufficient so that a reasonable juror could be convinced of the guilt of each of the appellants beyond a reasonable doubt.[4] Both the prosecution's case and the defendants'

4 The outline may not have shown this with respect to Corallo, who, on the Government's evidence, was an adviser, or perhaps a stimulator, and a temporary holder of some of the funds. But there was ample evidence to raise a question for the jury whether he had joined in the conspiracy; if the jury so found, he was criminally responsible for the acts of the other conspirators and his own failure to perform more than a few overt acts would be immaterial. See Note, Developments in the Law, Criminal Conspiracy, 72 Harv. L. Rev. 920, 940, fn. 168-171 (1959). Corallo did not take the stand.

had their strengths and their weaknesses; it was for the jury, under proper instructions, to decide between them. So we pass to the many claims of error pressed upon us.

We have considered all these with care; our opinion will confine itself to those we deem most significant. For convenience we shall divide the claims into three categories: (I) Those relating to matters which arose prior to the judge's charge; (II) those relating to the charge itself; and (III) those relating to matters occurring subsequent to the submission to the jury.

I. Matters Arising Prior to the Judge's Charge.

(1) *Alleged use of information obtained by unlawful search and seizure.* Counsel for Justice Keogh complain of the court's refusal to grant a hearing, under F. R. Crim. Proc. 41 (e), as to the Government's use of information from his personal telephone message books, allegedly obtained by an illegal search and seizure. The facts as to how the Government obtained access to these books were developed at a hearing outside the presence of the jury, when the Government sought to compel their production during presentation of its case and Keogh's trial counsel objected, apparently on the basis of the privilege against self-incrimination, and also, to some extent, through testimony later given by Justice Keogh. After this hearing the Government withdrew its request for production of the message books, but Keogh's trial counsel contended that the facts that had been developed showed that the Government's previous access to the books constituted an illegal search and seizure and thus required a further hearing to determine the information that had been obtained and

the use to which it had been put. The claim was that the Government had used the information to "refresh" Erdman's recollection so that his trial testimony as to the dates and times of his contacts with Keogh would tie in with messages recorded in Keogh's books, as his grand jury testimony in July and August, 1961, allegedly had not.

The Government answers that Keogh consented to the examination of the message books, both by giving advance permission and by never expressing any objection despite his knowledge that the examination had taken place.[5] Moreover, it argues that even if access had been illegally obtained, the motion for a hearing looking to suppression of the fruits of the search was untimely under F. R. Crim. Proc. 41(e), coming, as it did, in mid-trial and long after Keogh had learned that the "search" had been conducted. We find it unnecessary to pass on the latter contention, which would require us to consider, among other things, whether the requirement that "if such a claim is made after the trial is under way, the judge must * * * be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim," *Nardone* v. *United States*, 308 U. S. 338, 342 (1939), refers only to

---

5 The Government's position is not inconsistent with its withdrawal of the request for production of the books, even if the latter was based on a belief that the evidence adduced at the hearing failed to establish a waiver by Keogh of his privilege against self-incrimination. For the evidence could well have been insufficient to show such a "binding pledge" to waive the privilege as would entitle the Government to require the defendant to *produce* papers that had remained in his possession, see 8 Wigmore, Evidence (McNaughton rev. 1961), § 2275, yet sufficient to show such consent to their *examination* as would negative an unlawful search. Quite evidently this was Judge Weinfeld's view.

knowledge of the search and, if so, how complete the knowledge must be, or must include knowledge that what the Government obtained by the search was to be put to a detrimental use. For the evidence here warranted the court's conclusion that no illegal search had occurred.

Two agents of the FBI, Maher and Gallagher, came by appointment to see Justice Keogh in the Kings County Supreme Court on the morning of September 15; he adjourned court and met them in a robing room adjacent to his courtroom on the 7th floor. Justice Keogh's attitude had been one of full cooperation with the Government's investigation; he had been interviewed by FBI agents and had made records of his bank accounts and his checkbooks available to them. Knowing that the FBI wished to interview his two clerks, Benjamin and Seigel, he had arranged for them to be waiting in the robing room. Then, in Keogh's words, "I told my two clerks that I thought it would be more comfortable if they went up to the eleventh floor chambers, * * * and told my clerks to give them [the FBI agents], to the best of their ability, any information they should like". Benjamin's version of Keogh's instruction was, "'Tell them everything they want to know and be cooperative with them'", or, as he restated it, "'Go with these two gentlemen up to the 11th floor chambers and tell them anything they want to know'". Agent Maher testified: "Judge Keogh told Mr. Seigel and Mr. Benjamin that we were going to interview them and that they—he wished that they would cooperate and furnish any information that we requested." After the agents had finished questioning Benjamin in the 11th floor chambers, they asked

if the judge kept any notes of his telephone messages. Benjamin showed them the telephone message books, whereupon "They took, I believe it was, the current book with the hard cover on it and skimmed through the pages". Keogh testified that later in the day one of the clerks "said the agents thumbed through them [the telephone message slips] and asked what the red checks meant, and that was all I heard about that". At no time during his frequent contacts with the Government in the ensuing weeks, during which he submitted to further interviews and testified before the grand jury, did Justice Keogh indicate objection to what had been done.

Judge Weinfeld was warranted in refusing to find in this the "forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods" condemned in *Boyd* v. *United States*, 116 U. S. 616, 630 (1886). True, the protection of the Fourth Amendment is not limited to cases where force is used, as *Gouled* v. *United States*, 255 U. S. 298 (1921), clearly shows. But here we have no case such as was there presented, of "a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call" gaining access to a defendant's premises by subterfuge and making a "search and seizure subsequently and secretly * * * in his absence * * *." Here the representatives of the United States came openly and by appointment to get information which Justice Keogh, a former federal prosecutor well aware of his rights, indicated—not only by his words but by his prior and subsequent conduct—that he was entirely willing to give;

his consent was quite sufficient to include the telephone message books kept by the clerks. Although each of the many decisions in this area necessarily turns on its own facts, we find *Howe* v. *United States*, 208 F. 2d 916 (8 Cir. 1953); *United States* v. *Dornblut*, 261 F. 2d 949 (2 Cir. 1958); and *United States* v. *Martin*, 176 F. Supp. 262 (S. D. N. Y. 1959), sustaining the propriety of the agents' conduct, more nearly apposite than others, cited by counsel for Keogh, which held the alleged consent to be involuntary and the search unlawful. While the court was thus warranted in holding that the agents' checking of the telephone message books was not an unlawful search and that there was thus no basis for a separate hearing directed to the suppression of its fruits, this did not prevent Keogh's counsel from developing at the trial itself that the information obtained from the message books had been used to prompt Erdman; he could have called Maher and Gallagher, interrogated them as to what information they had obtained and what they had done with it, and then, on a suitable showing, had Erdman recalled for further cross-examination. We realize that, as a matter of trial tactics, this was a far less attractive course, very likely an altogether unattractive one; but it was all counsel was entitled to.

(2) *Newspaper headlines.* Judge Rayfiel testified on Friday, June 1, 1962, in regard to his luncheon with Justice Keogh on the day preceding the sentencing and to his seeing Dr. Erdman at Keogh's request on the next morning.[6] The Journal American for the afternoon of June 1 carried

---

6 The core of Judge Rayfiel's direct testimony as to the luncheon conversation is set forth in footnote 16 *infra*.

a large-type banner headline "U. S. Judge accuses Keogh"; the World-Telegram had a four-column headline, "Judge Testifies Keogh Made Bid for Leniency." When the trial resumed on Monday, counsel for the defendants moved for a mistrial. The judge announced he would question the jurors separately in the presence of counsel. The questioning revealed that although all the jurors had followed the judge's instructions not to read newspaper articles about the case, eight jurors and three alternates had not been able to avoid seeing the headlines; they all asserted, however, that these had not affected their ability to decide the case solely on the evidence. The court denied the motion for a mistrial and also a request that Judge Rayfiel's testimony be read to the jury; but, as we shall see, this testimony was read to the jury at its request on the afternoon before it reached its verdict.

Whether Judge Rayfield's direct testimony was that Justice Keogh himself had sought leniency for Moore or merely that he had passed on a friend's request—an issue we shall discuss further when we come to the charge—the World-Telegram's headline was within the range of fair characterization. The Journal American's was not; Judge Rayfiel had simply stated his recollection of the facts and had further said that he saw no impropriety "in anyone speaking in behalf of a man about to be sentenced." A misleading headline printed so large that conscientious jurors cannot help seeing it hardly bespeaks a proud and responsible press, whose constitutional freedom rises no higher than the criminal defendant's right to a fair trial. However, we find it quite impossible to believe that the jury, which had seen and heard Judge Rayfiel that after-

noon, which was to listen to so much exegesis of his testimony in the way of summations by counsel and instructions by the court, and which was finally to request a reading of that testimony, could have been so affected by an inflammatory verb in a newspaper headline, two weeks before its verdict, as to impeach the verdict's validity. Comparison of the facts here with the publicity relating to inadmissible prior offenses in *Marshall v. United States*, 360 U. S. 310 (1959), or the "build-up of prejudice" in *Irvin v. Dowd*, 366 U. S. 717, 725 (1961), shows the inapplicability of these cases, and of the salutary principle for for which they stand.

(3) *Admission of evidence of gifts and loans from Erdman to Justice Keogh.* The Government was allowed to prove that Erdman had made gifts to Justice Keogh of a car in 1959 and of storm windows, had lent him $2500 in 1960, had made him a further loan of $1000 on June 28, 1961, when, as Erdman testified, Keogh "said he was going to Great Barrington and that he needed some more money," and, on July 14, 1961, had sent him a further check for $500, Erdman testifying that Justice Keogh had solicited this in terms rather similar to the previous loan, whereas Keogh had testified before the grand jury that it was unsolicited. The judge admitted this evidence "solely for the purpose of showing the relationship and association between the defendant Keogh and Erdman"; he reiterated this limitation during the trial and in his charge, adding "There is no claim that the loans were payments in furtherance of the conspiracy" and that "in no respect may the testimony as to the loans or gifts or any exhibits relating

thereto be considered as proof of the conspiracy here charged." Counsel for Keogh urge the admission of the evidence was error, claiming that the danger of the jury's viewing the gifts and loans as evidence of other corrupt endeavors outweighed any probative value the material had as showing a friendship between Justice Keogh and Dr. Erdman, which the defense had conceded.

There can hardly be doubt that the evidence passed the basic test of relevancy; "the evidentiary fact offered does not need to have strong, full, superlative, probative value, *does not need to involve demonstration* or to produce persuasion by its sole and intrinsic force, but merely to be *worth consideration by the jury*." 1 Wigmore, Evidence (3d ed. 1940), 411. A jury could well believe the type of relationship which these transactions tended to establish was far more likely to produce, or to have produced, an attitude of mind in which Keogh might suggest a financial reward for an intercession with Judge Rayfiel than a relation between doctor and patient that had developed into a close friendship. Moreover, characterization of these incidents by the general phrase "gifts and loans" considerably understates their significance. Erdman's reference to the 1959 car was a part of his statement that, on their first discussion of the *Moore* case, Keogh said "that the car I got him in 1959 was a little old and that he could use a new car"; the storm windows and the 1960 loans related to the Justice's summer home at Great Barrington, further requirements for which were listed on the card which Erdman claimed was given to him at the same meeting; the statements of financial need allegedly made in June and July, 1961, tended to show that Keogh needed money

for the Great Barrington project and otherwise and thus to support Erdman's story as to the corrupt transactions; and the pharse "some *more* money" in Erdman's description of the June loan, was part of a conversation where the possibility of Moore's seeking a refund was also allegedly discussed. The court's restriction on the purpose for which the jury might consider the evidence, although doubtless wise, thus operated to defendants' advantage.

We see no warrant for counsel's fear that the jury was likely to take this evidence as proving generally bad character or previous corrupt efforts to influence the administration of justice. The Government made no such suggestion, and the court expressly narrowed the purpose for which the evidence could be considered. However, if in fact the evidence was susceptible of such use despite the limiting instruction, its admission would still not call for reversal since "the inadmissibility of an evidential fact for one purpose does not prevent its admissibility for any other purpose otherwise proper." 1 Wigmore, *supra*, at 711. Even if the evidence had been far more liable to improper use than it was, "As we have so often held, evidence relevant to the proof of one crime is not incompetent because it discloses the commission of another." *United States* v. *Eury*, 268 F. 2d 517, 520 (2 Cir. 1959), citing many cases. True, the trial judge should, in an exercise of sound discretion, exclude evidence tending to show the commission of other crimes "where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *State* v. *Goebel*, 36 Wash. 2d 367, 218 P. 2d 300, 306, cited in McCormick, Evidence (1954), 333, fn. 28; cf. *Grunewald* v. *United States*, 353 U. S. 391

424-25 (1957). But the judge's conclusion that the relevance of this evidence outweighed any tendency to undue prejudice, with the cautionary instruction he repeatedly gave, was in no manner an abuse of discretion; indeed, we think exclusion of the evidence would have been wrong.[7]

(4) *Exclusion of evidence of practice of other Eastern District judges to receive presentence information.* Objection is made to the court's refusal to allow Justice Keogh to testify whether, during the period when he was United States Attorney for the Eastern District in 1945-1949, "there [was] an accepted practice by * * * every federal judge in Brooklyn, to receive information from sources other than the presentence report on the family status and background of persons about to be sentenced"; he was permitted to testify "it was Judge Rayfiel's practice to try to obtain other than through the Probation Department any information that might come from clergymen, relatives, friends, so that he could evaluate the entire panorama of the background of the particular person to be sentenced." Judge Rayfiel had previously stated that "within the limits of the time that was available, I would talk with any person who had anything to say in behalf of a person about to be sentenced." There was no challenge to the defendant's point

---

7 *People* v. *Mullens*, 292 N. Y. 408, 55 N. E. 2d 479 (1944), heavily relied on by counsel for Keogh, is distinguishable on the ground, stated in the opinion, that "Solomon's habit so-to make use of Bitterman's name had already been demonstrated and was undisputed"; hence the evidence showed a "remote and merely cumulative fact" rather clearly pointing to criminal conduct, and its admission was an abuse of discretion. Here, even assuming the evidence to have been as prejudicial as that in *Mullens*, which we doubt, it was markedly more probative in its relevant aspect.

that Justice Keogh was warranted in believing he might properly discuss Moore's sentence with Judge Rayfiel, although, on his own testimony, the aid he could afford was scanty—if his motivation was solely what he claimed it to be. It is thus hard to see the relevancy of evidence showing that, as a result of his experience as United States Attorney a dozen years before, he would have felt equally warranted in having a similar discussion with other judges who at that time had been on the bench of the Eastern District along with Judge Rayfiel, then the junior judge: "[L]egal relevancy denotes, first of all, *something more than a minimum of probative value.* Each single piece of evidence must have a plus value." 1 Wigmore, *supra*, at 409-10. The court did not err in concluding that the proffered evidence did not meet this standard—particularly in view of the areas that might have had to be opened for rebuttal by the Government if the evidence had been admitted. Trial judges have wide discretion to exclude for remoteness. *Duvall* v. *Buden*, 124 Conn. 43, 198 Atl. 255 (1938); McCormick, *supra*, at 320.

(5) *Cross-examination of Kahaner with respect to his brokerage accounts.* Kahaner complains of the cross-examination with respect to stock transactions set forth in the margin.[8] On the redirect which followed immediately, he

---

[8] "Q. Mr. Kahaner, did you purchase any stock in the year 1961? A. Yes.

Q. Isn't it a fact that you purchased $95,000 worth of stock? A. I have no idea of the amount. Mr. Hundley. I use an investment adviser who trades in my account as he sees fit. He buys and sells. If you mean a total of $95,000?

Q. Yes. A. I would say I bought stocks and sold stocks, some of which was replaced. I don't know the total amount.

testified that he had never purchased any stock with cash or made any large cash deposits in brokerage or other accounts. It was later stipulated that the only money deposited in his brokerage accounts in 1961 was $200 by check on January 28; hence the large figure in the prosecutor's questions could only have represented purchases made with proceeds from the sale of securities already owned. The contention is that the prosecutor knew this when he asked the questions we have quoted. If this be so, and the Government's brief does not deny it, we must regard this cross-examination as a blemish on what seems otherwise to have been an entirely fair, although properly vigorous, presentation of the Government's case. But the court stopped the inquiry at an early stage, Kahaner largely set matters right only a few moments later, the stipulation finished the job, and no further reference to the matter was made. Under these circumstances, we cannot consider that

---

Q. Would you deny that it was $95,000?

Mr. Kleinman: Objection, your Honor.

The Court: I will allow him to answer.

Q. I will take any explanation you want to give. A. My accounts were at Merrill Lynch and Eastman, Dillon and whatever the accounts reveal are what is in there, Mr. Hundley.

Q. Would it be fair to say that you had $95,000 worth of stock in 1961? A. I may have.

Mr. Kleinman: I must object to this. We don't know when it starts, the first purchase, how long he had it or anything else.

The Court: Yes. If you want to go into this, I think you have to lay a proper foundation. I don't think there is any point in culling one particular figure out and using that. It may distort the true picture.

If you want to develop the evidence on a permissible legal theory, I will allow it.

Mr. Hundley: I have no further questions your Honor."

the prosecutor's questions, unfair though we deem them to have been, created such prejudice as to call for reversal.

(6) *Failure to furnish Jencks Act statements of witnesses against Kahaner.* Rose Kippe, secretary to the Chief Assistant United States Attorney, was called by the Government solely to identify and explain the record she kept of incoming telephone calls that Kahaner had been unable to take; later she appeared as a witness for Kahaner and gave important testimony on his behalf. Complaint is made that, despite a pre-trial agreement that all witnesses' statements subject to production by the Government under 18 U. S. C. § 3500 would be given to defense counsel without the need of request, such a statement of Mrs. Kippe's was not produced until she appeared as a defense witness, when the Government had it marked for identification and made some slight use of it on cross-examination. We have examined the statement; it is in full accord with the very limited testimony given by Mrs. Kippe as a witness for the Government, which was not disputed by anyone. Kahaner's brief also complained of the Government's failure to furnish any statements by Rose St. George, an employee of the United States Attorney's office, and Dr. Fred Miller, an FBI document expert who testified on rebuttal as to certain obliterations in Kahaner's diary; it asked that the Government tell us whether any such statements exist. The Government has advised that there was a report by Dr. Miller made to the FBI on June 7, 1962, the day preceding his testimony; we have read it and find it to be simply a summary of the findings to which Dr. Miller testified. These objections thus fail under the

harmless error rule, 28 U. S. C. § 2111. *Rosenberg* v. *United States*, 360 U. S. 367 (1959).

(7) *Use of Moore's grand jury testimony with respect to Corallo.* The case against Corallo rested wholly on the testimony of Erdman and Moore. Both had implicated Corallo in their grand jury testimony, and Erdman did so at the trial. However, on the Government's first question to Moore at the trial which involved Corallo's knowledge of the proposed corrupt endeavor, he answered "I didn't tell Coralio what this $10,000 was for." Government efforts to refresh Moore's recollection on this and other questions by reference to his grand jury testimony proved largely unsuccessful. He completely exculpated Corallo on cross-examination by the latter's counsel. Thereupon the prosecutor sought permission to examine Moore on his grand jury testimony, stating that he was surprised by Moore's trial testimony since it was substantially different from what Moore had told the grand jury and Moore had given assurances that the grand jury version was the truth. After an over-night adjournment, the court found that with respect to four specific matters the Government's claim of surprise was justified and ruled that, under the authority of *United States* v. *Di Carlo*, 6 F. 2d 364, 367-68 (2 Cir.), cert. denied, 268 U. S. 706 (1925); *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925 (2 Cir.), cert. denied, 353 U. S. 984 (1957); and *United States* v. *Murray*, 297 F. 2d 812 (2 Cir.), cert. denied, 369 U. S. 828 (1962), the Government would be allowed, if a further attempt to refresh Moore's recollection failed, "to question the witness as to whether he had not been asked certain questions and give[n]

certain answers thereto as shown by the grand jury testimony on this subject." The court instructed the jury that evidence so taken was to be considered only against Corallo, and also that "To the extent that any evidence was elicited from this witness of his prior testimony before the grand jury, that is not to be treated as affirmative proof of the fact," but "together with his current trial testimony, only goes to the issue of his credibility on these matters."

Counsel for Corallo argues that the prosecutor was not in fact surprised and that, despite the judge's instruction, the jury really was asked to accept Moore's grand jury testimony rather than what he said at the trial. As to the first point, the showing of surprise met the rather modest requirement of such cases as *United States* v. *Graham*, 102 F. 2d 436, 442 (2 Cir.), cert. denied, 307 U. S. 643 (1939); *Ellis* v. *United States*, 138 F. 2d 612, 616 (8 Cir. 1943); *Weaver* v. *United States*, 216 F. 2d 23 (9 Cir. 1954); and *Stevens* v. *United States*, 256 F. 2d 619, 622-23 (9 Cir. 1958). On the second point, the court conformed to the judicially sanctioned ritual; whether the time may not have come to recognize the realism of Corallo's analysis, but to answer it by the franker and bolder approach apparently advocated in Judge Learned Hand's pioneering opinion in *Di Carlo*, *supra*, 6 F. 2d at 368; see McCormick, *supra*, § 39; 3 Wigmore, *supra*, § 1018, note 2; Morgan, Hearsay Dangers, 62 Harv. L. Rev. 177, 192-96 (1948); cf. *Bridges* v. *Wixon*, 326 U. S. 135, 150-55 (1945), we leave for another day.

II—Criticisms of the Judge's Charge.

The criticisms of the charge are somewhat more serious. Almost all relate to the judge's handling of the facts. We find but two significant criticisms that relate to the law, and even in those cases, as our discussion will show, the error alleged is not in the statement of the law as such but in its relation to the evidence here.

A.

(1) Kahaner criticizes a portion of the charge where, after stating that it would not be unlawful for Justice Keogh to have spoken to Judge Rayfiel about Moore for disinterested reasons but that it would be if he had received cash from Erdman on behalf of Moore, the judge made the remarks quoted in the margin.[9] The criticism is that there was no evidence that Kahaner had ever "used his position as Williams' superior * * * to obtain suspended sentences for those indicted," and also that, although there

---

9 "Similarly, it is not illegal to speak, or agree to speak, to a United States Attorney or any assistant in charge of a prosecution about its status. Thus, the conversation between Kahaner and Williams the assistant United States attorney, who was in charge of the Moore case, is not, in and of itself, proof that Kahaner was a member of a conspiracy corruptly to obstruct justice, as charged in the indictment.

"But if you find that Kahaner used his position as Williams' superior in an endeavor to have fewer persons indicted than those contemplated by Williams or to obtain suspended sentences for those indicted in consideration of cash, paid or to be paid to him under an agreement or arrangement with Erdman, then you have sufficient to find that that endeavor was corrupt and, further, that he was a member of the conspiracy here charged, provided you also find all the other essential elements thereof are established."

was evidence that Kahaner had made some inquiry in January whether Williams would be satisfied to indict two rather than three, there was no evidence that Kahaner had any arrangement with Erdman at the time for a cash consideration. The first criticism seems well taken; it may or may not be a sufficient answer to the second that the jury could have drawn an inference that Kahaner had already formulated an idea of seeking to obtain money from the prospective defendants in the bankruptcy case and thought that success in reducing the number to be indicted would enhance the interest of those who were. What is a sufficient answer to both criticisms is that no exception was taken, as required by F. R. Crim. Proc. 30, and that the error was a long way from being so prejudicial as to attract the rule, F. R. Crim. Proc. 52(b), entitling us to notice "Plain errors or defects affecting substantial rights * * * although they were not brought to the attention of the court." Right after the remarks quoted in the margin the judge said that "if you should find that no cash payment was made to Keogh or Kahaner * * * there would be no basis for a finding of corrupt endeavor," and went on to say, "All counsel agree that the central and basic issue in the case is whether the money was paid over to Keogh and Kahaner"—a point which the summations had made abundantly clear. It is quite inconceivable that this jury, whose attention and intelligence are demonstrated so tellingly by the highly pertinent requests for evidence made during its deliberations, convicted Kahaner on the basis of his talk with the Assistant United States Attorney before any money was claimed to have been promised.

(2) Another criticism relates to the so-called restitution phase of the conspiracy. The Government's theory, a permissible one under the indictment and the law, was that after the debacle on March 30, the conspiracy continued—with the proposed restitution, an idea allegedly initiated by Kahaner and forwarded by Justice Keogh, simply another means to achieve the same end of reduced punishment. The defendants say it was wrong to let the jury consider this at all since there was no evidence of any corrupt endeavor to influence anyone during this period. Even if we should limit ourselves to Jaspan's testimony, that would hardly be true; if Jaspan was being utilized by the defendants in pursuit of their corrupt endeavor, *non constat* that he knew nothing of the payments and was acting entirely lawfully and in complete good faith. "[I]t is well settled that acts which are themselves legal lose that character when they become constituent elements of an unlawful scheme." *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690, 707 (1962). Moreover, the claim ignores Moore's testimony as to the remark allegedly made by Justice Keogh in relation to Judge Rayfiel to which we have previously referred. The defendants also claim the charge on the restitution phase was erroneous. The court said that the jury must first determine whether the conspiracy ended on March 30; that if it so found, then, in deciding whether a defendant had been a member of the conspiracy, it must exclude all evidence of the restitution plan other than admissions of the particular defendant; but that if it found that the conspiracy continued beyond March 30 to the end of May, it might consider acts or

declarations of all co-conspirators during that period in furtherance of the conspiracy's objectives. This seems entirely right.

B.

Appellants rely more heavily on their criticisms, both general and specific, of the judge's treatment of the evidence. The general criticisms, that the judge spent more time in stating the Government's than the defendants' case and that he ignored points developed by the defense on cross-examination and inconsistencies among the Government's witnesses, are rather plainly lacking in merit. The general plan of this portion of the charge was to state first the Government's case and then the defendants' contentions. This is a traditional method of presentation and one rather helpful to the jury since it generally follows the order in which the evidence has been heard, although it almost necessarily involves giving more time to the prosecution's case than the defense, which, in the nature of things, often must take the form of a denial. We cannot believe juries are misled by this method of commenting on the evidence, any more than they are by the fact that more time is usually devoted at the trial to hearing the evidence of the prosecution than of the defense, which sometimes offers none at all. Moreover, doubtless in an effort to prevent any possible unfairness from this organization of the charge, the judge repeatedly interrupted the statement of the Government's case to include at least a portion of the defense's answer. And at the very beginning of his summary of the defendants' contentions, he emphasized that defendants "point to the inconsistencies

and contradictions contained in the testimony of government witnesses and the contradiction of their testimony by other government witnesses."

It is convenient, despite some overlapping, to divide the specific attacks into three categories: (1) Failure adequately to charge a theory of defense; (2) misstatements of the evidence; and (3) failure adequately to present defendants' answers to various claims of the Government.

(1) Counsel for Kahaner did not question that Moore had paid $35,000 to Erdman in aid of a corrupt endeavor to influence the administration of justice. His theory, which was joined generally by the other defendants save that counsel for Keogh also questioned whether the money ever had been raised, was that Erdman intended from the outset to pocket the money, did exactly that, and then, when his iniquity was discovered, decided to implicate Kahaner, Keogh and Corallo in an effort to gain favor with the Government, with Moore joining in the endeavor for the same reason. More specifically, the theory was that Erdman's cupidity had been aroused when he learned the prospective defendants were thinking of engaging a well-known Washington, D. C., lawyer for $60,000 plus an estimated $10,000 for disbursements; that, after first suggesting that a New York lawyer could be retained for half that amount, he had the happy thought of getting this money for himself by promising to bring about the desired result through corrupt means; that he pressured Moore down the primrose path, and that he then lulled Moore and the other defendants in the bankruptcy case into a false sense of security by talk of arrangements with Kahaner and later of assistance from Justice Keogh which

existed almost exclusively in Erdman's mind and on his tongue. Defendants claim this theory received substantial support from one of the wholly disinterested witnesses, M. Hallsted Christ, the trustee in bankruptcy of Gibraltor. Christ had called Erdman shortly before July 13 to say that the first of Moore's $1000 notes had been returned for lack of funds and to ask Erdman to make good; Erdman said he had already sent a check to Jaspan. Christ went on: "In the course of my conversation with Dr. Erdman, he indicated that he had security of $35,000 and asked me whether I could get any leads on assets of Mr. Moore that would bring him an additional $15,000 and he indicated that he had a firm of attorneys working to obtain that additional $15,000." Under date of July 13, Erdman wrote Christ a letter which began:

> "Sorry to have caused you any inconvenience. Mr. Moore apparently now feels that his case is unreasonable and he apparently does not plan to pay his notes. I am security for the first $35,000.00 and certainly would appreciate it if further security for the $15,000.00 could be obtained. Any information you have regarding this would be appreciated."

Interpreting the letter in the light of Christ's testimony as to the telephone call and other undisputed facts, it seems entirely clear, despite the Government's contention to the contrary, that, as indeed Erdman admitted on cross-examination, he meant "I am secured for the first $35,000"—a highly significant figure on defendants' theory. When taxed with this, Erdman said his statement as to security related to $35,000 in Ace Manufacturing Co.—an explanation which was attacked by Keogh's counsel in summation, which the

Government does not attempt to elucidate in its brief, and which we do not understand. After the charge had been concluded, Kahaner's counsel—admitting "I overlooked it completely in my request"—asked the judge "to charge the jury with respect to the testimony of Mr. Christ and [illegible] the letter of July 13th, that it is part of the defendant Kahaner's theory that Erdman got the money and kept [sic] it." After noting that counsel had argued the point to the jury in his summation, the judge declined.

As was held in *United States* v. *Strassman*, 241 F. 2d 784 (2 Cir. 1957), such an oral request made after the conclusion of the charge was too late under F. R. Crim. Proc. 30—a rule grounded both on the danger of error inherent in the necessarily rapid consideration of an oral request at such a time and on the possibly undue impact of a separate charge devoted to a single fact or theory. Still we might well invoke the "plain error" provision of Rule 52(b) if such a basic theory of defense as that Erdman intended to and did keep the money, had in no way been put before the jury. But that was not at all the case. The theory had been extensively argued in the opening on behalf of Keogh, and in the summation of Kahaner's counsel which also included the support allegedly afforded by Christ's testimony and Erdman's letter. Moreover the charge itself told the jury, in a passage previously quoted, that the one thing on which all counsel agreed was that the jury could not find Keogh or Kahaner guilty unless it found that the money was paid to them; after all it had heard, the jury scarcely needed to be told explicitly in the charge that the money could not have been paid to Kahaner and Keogh if Erdman had kept it.

(2) Judge Weinfeld described the meeting at which the $35,000 plan was first put by Erdman before Moore, Deutsch and Cohen in the manner set forth in the margin.[10] The defendants level two attacks at this:

The first concerns the dates assigned to the telephone call from Kahaner to Erdman and Erdman's meeting with Moore, Deutsch and Cohen. At one point in his direct examination Moore gave the date of the delivery of the first $5,000 to Erdman, which, of course, was subsequent to the meeting, as "the 10th of February—yes, about the 12th or 13th of February." Under cross-examination by Kahaner's counsel, Moore said repeatedly that the meeting at which Erdman first asked for money was on February 10 or "a day either way, the 10th or 11th." The importance of this was that Kahaner concededly was on a vacation in the Caribbean from February 2 to 13; hence, if the meeting was on February 10 or 11, Kahaner could not have called Erdman shortly before it as Erdman claimed. Kahaner's counsel took proper exception to the judge's failure to call the jury's attention to Moore's testimony as to the date.

10 "Thereafter, according to Erdman, past the second week of February, Kahaner called him and said three of those arrested would be indicted; three would not, and that he would see that the indicted three would be treated softly by having the case brought before an agreeable judge in April, for which he wanted $35,000; and thereafter just past February 14th, about the 15th or 16th, Erdman conveyed Kahaner's request and information to Deutsch, Cohen and Moore.

"In addition to Erdman, Moore, Deutsch and Cohen, the other alleged participants in the conference, testified, and while there are differences as to some matters which were discussed, they appear to be in accord that Kahaner's proposal for payment to him of $35,000 was submitted by Erdman at that meeting."

Although it would have been better if the judge had done so, we do not find his refusal to modify his charge to have been prejudicial. The charge itself was accurate; Erdman had fixed the call from Kahaner as "past the second week of February." Moreover, Moore himself on direct examination had first described the meeting as being "About the middle of February", and during his cross-examination, even before Kahaner's counsel had gotten him thoroughly committed to February 10 or 11 as the date of the meeting, Moore had altered the date of the delivery of the money from February 10, as he had testified on the previous day, to February 20—a date consistent with Erdman's fixing the telephone call at a date after Kahaner's return. Deutsch and Cohen also placed the meeting during the week of February 12. More important, the point as to the date had been developed by Kahaner's counsel on summation with such skill and vigor that it must have been deeply impressed on the jury's mind—an impression that ought to have been reinforced by the judge's saying, in his summary of Kahaner's defense, "that shortly thereafter [i.e., after his talk with Williams] he left for a holiday and did not return to the United States until February 14th." This issue was of the sort the judge may have had in mind when he emphasized in his additional charge, given after taking the exceptions, "that counsel, during the course of their summations, referred to various matters which they stressed and believed were important and to which I did not refer, and, of course, you will bear these matters in mind."

The other attack concerns the judge's statement that the four participants in the meeting, although differing as to some matters, "appear to be in accord that Kahaner's

proposal for a payment to him of $35,000 was submitted by Erdman at that meeting." This was not correct. The four participants were in accord that a $35,000 payment was proposed, and Erdman and Moore were in accord that Erdman had characterized the proposal as coming from Kahaner and as being for a payment to him. But Deutsch testified only that "Dr. Erdman told Mr. Moore that he though he could do something for him, that it would cost $35,000. And he said he is doing it for my cousin, that was the only reason that he had gotten involved." Cohen said on direct examination "At that time Dr. Erdman told him [Moore] that $35,000 would take care of it"; under cross-examination he elaborated that he believed at the time that the $35,000 was going to a lawyer for his fee.

Analyzing the record from our vantage point, the variance can be deemed quite significant. Throughout the trial no witness save Erdman and Moore testified that Kahaner ever sought a payment or that any payment was made; corroboration of Erdman's mention of a Kahaner proposal for a payment, even from co-conspirators such as Deutsch and Cohen, would thus be important, and their failure to recount this even more so. We find no indication, however, that any such significance was attributed to the judge's slip by anyone at the trial. No exception was taken by defense counsel; had it been, the judge would doubtless have given a corrective instruction as he did on another matter, where no actual error had occurred. This absence of exception is important, not merely from the standpoint of compliance with F. R. Crim. Proc. 30 and the necessity, on which the Rule rests, for avoiding retrials on grounds not called to the judge's attention, but for another reason we find equally

pertinent here. If the judge's inadvertent error did not attract the attention of any of the alert and capable counsel representing these defendants, it is fanciful to think that this single sentence in a charge of more than sixty printed pages so impressed the jury as to have influenced their decision—and to have done this despite the judge's admonition, made more emphatic by repetition in his additional charge, that "if any reference by me does not accord with your recollection, you will disregard entirely what I have said and be guided by your own independent recollection." Appellants say the latter instruction is a mere formal incantation with which jurors cannot possibly comply in a trial of this length. So it might be if the judge had delivered the kind of invective described in *Quercia v. United States*, 289 U. S. 466 (1933), which appellants cite to us, or even if he had mistakenly stressed that Deutsch and Cohen had corroborated Erdman and Moore in this important particular. But where nothing of the sort occurred, it is as least an equal defiance of reality to suppose that this mistaken reference, which did not attract an objection from attentive counsel, lingered in the jury's mind.

(3) Appellants' many other criticisms relate to alleged inaccuracy in the sense not of misstatements[11] but of claimed failure to convey the full thrust of their evidence. We shall deal specifically only with the two most important; for the rest we must be content with some general observations, which are also pertinent to the particular criticisms

[11] They would regard their point relating to Judge Kaufman's testimony as being a misstatement, but we would not for reasons developed below.

about to be discussed and, in some measure, to those that have been.

It is quite impracticable for a trial judge, summarizing a case to a jury, to develop each piece of evidence offered in support of an indictment, each item offered in rebuttal, and each opposing inference sought to be drawn. An appellate court reviewing such a summary not only must consider it as a whole but must place it in the setting created by the jury's hearing of the evidence and the summations of counsel. Many of appellants' contentions on this phase of the case read as if Judge Weinfeld alone had heard the witnesses and the summations, with the jury receiving nothing but the charge. Although on such a hypothesis the summary here would not have adequately conveyed the case of either side, nothing follows from that; if the judge had thought the jury was solely dependent on his summary, he would surely have made a quite different one. True, "The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him;" *Burke* v. *Maxwell*, 81 Pa. 139, 153, quoted with approval in *Starr* v. *United States*, 153 U.S. 614, 626 (1894); but, if this were pressed to the extent of requiring the inclusion of every thrust and counterthrust, the judge would be taking over the province of the witnesses and of counsel. Judge Weinfeld was at pains to make it clear he essayed no such role, as the remarks already quoted show.[12] Moreover, although our discussion

12 While a federal judge is privileged to "sum up the facts to the jury" if these are clearly left subject to its determination, *Starr* v. *United States*, *supra*, 153 U.S. at 624-25, he is not required to do so. Whether or not he should, rests "in his discretion," *ibid.*, it "is within his province, whenever he thinks it

is necessarily focused on the claims of the defendants as to the judge's failure to bring out evidence and inferences favorable to them, it is fair to note that he likewise made no reference to items strongly relied on by the Government.[13]

(a) One of the critical elements in the case against Kahaner was his alleged meeting with Erdman and Moore at a coffee shop near the Federal Building in Brooklyn on the morning of March 29, when he is claimed to have received the final $2500. The judge earlier instructed that, in contrast to most of the overt acts charged in the indictment, the Government was required to establish this date with precision. In the portion of his charge concerning the Government's case the judge summarized Erdman's testimony that he had arranged the meeting on March 28,

---

necessary." *Guercia* v. *United States*, *supra*, 289 U. S. at 469. Although we would not wish to press any thoughts on this subject against the views of experienced trial judges, it may not be amiss to query whether trial judges in this circuit address themselves to this preliminary question as regularly as might be wise. Thus, without remotely suggesting that it could be deemed error for the judge here to have summarized the evidence—or even that it would have been if objection had been made—we cannot but wonder whether, in a case like this, with a single-count indictment and after three days of pointed but fair summations by capable counsel, much was accomplished through another, and necessarily more compressed, summary by the judge.

13 One such item, which we cite simply by way of illustration, is the contrast, heavily stressed in the prosecutor's summation, between Justice Keogh's first F.B.I. statement that Erdman came along to his chambers on March 29 and his later statements that Erdman came with Moore and a man introduced as Forman, and his justification of the change on the basis simply of having consulted his diary entry "12:30 I.R.—Sanford Moore."

stated "So, too, the Government emphasizes that Kahaner's message diary, Kahaner Exhibit T, contains an entry on March 28th, 'Dr. Erdman called; call him,' but he doesn't recall if he returned the call," recounted Erdman's and Moore's version of the encounter with Kahaner, and went on "You will [illegible]ere too recognize that not only does Kahaner deny this but swore that on the morning of March 29th he conferred with Judge Harry Frank at the Supreme Court, Manhattan, and did not return to his office until about 10:10 or 10:15." Later, in summarizing Kahaner's defense, he made the statement quoted in the margin.[14] On counsel's oral request after the charge, the judge, again referring to Kahaner's claim to having been in Judge Frank's chambers on the morning of March 29, added "While Kahaner has testified and also offered other evidence in support of his alibi, this does not relieve the government of its burden upon the whole case of establishing beyond a reasonable doubt that on the morning of March 29th,

14 "As to March 29th, when both Erdman and Moore swore the $2,500 was given to Kahaner, he gives the lie to them. He swears that on that morning he conferred with Judge Frank, then sitting in the New York County Supreme Court, just across the street from this courthouse; that he was there from 9:30 or 9:40 to about 10:00 o'clock; that although the sign-in book that is in his own office has him entered at 10 o'clock, actually he got to his office at about 10:10 or 10:15 a. m.

"In support, he offers the testimony of Mrs. Kippe that she tried to locate him that morning at Judge Frank's chambers because word had been received that he was to be sworn in as United States Attorney pending official nomination of the new United States Attorney.

"Judge Frank, called by the Government, had no independent recollection as to whether he saw Kahaner and talked with him on March 28th or March 29th. He did recall, however, that whenever it was that Kahaner came to his chambers, it was sometime between 9:30 and 10 o'clock."

Moore handed Kahaner, in Erdman's presence, $2,500 in the coffee shop in Brooklyn."

Counsel for Kahaner urges that the judge's endeavor to make a fair statement of the evidence on this important phase of the case failed in various respects. These are (i) that although the statement as to Justice Frank's lack of independent recollection of the date was literally correct, a fair reading of the testimony shows he believed the meeting occurred on the 29th rather than the 28th; (ii) that Kahaner's appointment book for March 29 shows at the top "Rm 557—Judge Frank";[15] (iii) that Mrs. Kippe testified she had seen this entry on the morning of March 29 when endeavoring to locate Kahaner; and (iv) that Kahaner's telephone message book, kept by Mrs. Kippe to record calls during his absence, showed a call from Dr. Erdman at 9:30 A.M. on March 29, this corresponding to the time when Erdman claimed he was with Moore and Kahaner in the Brooklyn coffee shop, and when Moore, whose testimony was in conflict with Erdman's on this point, claimed that Erdman was calling Kahaner in Moore's presence, speaking to him, and arranging the meeting for later that morning. Only the last of these omissions was made the subject of exception.

All these items were excellent points for argument on Kahaner's behalf; they were excellently argued by his counsel. But, as we have said, if the judge's summary of the evidence is to be a summary, it has to stop somewhere. While Judge Weinfeld's summary did omit some evidence favorable to Kahaner on this issue, it also omitted the

15 Room 557 was the room in the New York County Supreme Court building which Justice Frank was occupying.

Government's *ripostes*—Kahaner's signing out on the mornings of *both* March 28 *and* March 29 for "Official Business, Supreme Court"; his failure to call witnesses to corroborate his explanation that on March 28 he had in fact been with Internal Revenue agents and in the Surrogate's Court; the absence of any record of the call from Chief Judge Bruchhausen's office on the morning of March 29 which was claimed to have led to Mrs. Kippe's efforts to locate Kahaner; the testimony of the Government's expert witness that the entry with respect to the March 29 appointment with Justice Frank was written with two different instruments; and the contention that even if Kahaner's appointment with Justice Frank was on March 29, there was still time for him to meet Erdman and Moore before arriving in the Federal Building around 10:15 A.M. Had the judge mentioned these answers of the Government, it would doubtless be contended that Kahaner's replications should likewise have been stated. This episode illustrates that, as we have said, the judge's summary cannot be expected to perform the office of the witness and of counsel, and his omission to state a piece of evidence cannot be transmuted into an implied direction to the jury not to consider it when his express direction was the opposite. This is what lies behind the statement in *Allis v. United States*, 155 U. S. 117, 124 (1894), "we know of no rule that compels a court to recapitulate all the items of the evidence, even all bearing upon a single question."

(b) Counsel for Keogh criticize the summary of Judge Rayfiel's testimony. In outlining the Government's case, Judge Weinfeld said:

> "Judge Rayfiel testified that Keogh mentioned the Moore case; that Keogh said a good friend had talked to him on behalf of Moore; that his friend informed him Moore was a fine fellow and 'wondered whether leniency could be extended to him.'"

When he came to Justice Keogh's defense, he stated:

> "Contrary to Judge Rayfiel's testimony, he states that he did then mention Erdman's name as the friend of Moore on whose behalf he was speaking. Keogh also denies Judge Rayfiel's testimony on direct examination that he asked that leniency be extended to Moore. He testified that he made no suggestion as to the sentence to be imposed on Moore, and Judge Rayfiel, under cross-examination, testified to like effect."

It is contended that this cast Judge Rayfiel in an unfavorable light by making out that he first testified that Justice Keogh himself had sought leniency for Moore and then changed his testimony on cross-examination for Keogh's benefit, and that it placed Justice Keogh in the position of contradicting Judge Rayfiel's direct testimony; in fact, it is claimed, Judge Rayfiel had testified both on direct and on cross-examination that Keogh was simply transmitting a friend's request. This is said to be particularly serious in view of the episode of the newspaper headlines discussed above. Although the interpretation of Judge Rayfiel's direct testimony[16] is debatable, looking

16 "He told me that a good friend had spoken to him about Moore, told him that he, Sanford Moore was to appear before me the following day for sentence. And that his friend informed him that Moore was a very fine fellow and wondered whether leniency could be extended to him."

only at the cold type we would read it as appellants do, although it still could be considered inconsistent with Keogh's unqualified statement, "I didn't ask him to extend leniency." However, the matter does not seem to us to have the significance that appellants' counsel attach to it; evidently it did not strike them as significant at the time, since no exception was taken—and this although a colloquy on the occasion of the newspaper headlines should have alerted counsel to Judge Weinfeld's different understanding of Judge Rayfiel's testimony.

The two exceptions that were taken to the summary of Judge Rayfiel's testimony concern the failure to mention either Judge Rayfiel's corroboration of Keogh's testimony that the appointment for Erdman to come to the Judge's chambers was made on the morning of March 30, or his statement that Justice Keogh had never communicated with him in regard to the Moore case save on those two occasions, which is claimed to discredit the testimony of Moore and Erdman as to the remark allegedly made by Justice Keogh during the restitution phase. We see no need to add to our previous discussion of such omissions beyond pointing out again that, at the jury's request, the whole of Judge Rayfiel's testimony was read to them on the afternoon before they reached their verdict.

III. Matters Arising After Submission to the Jury.

The jury retired to deliberate at 3:50 P. M. on Thursday, June 14, 1962; it rendered its verdict at 7 P. M. on Saturday, June 16; it had sat late on both Thursday and Friday evenings. However, a considerable fraction of this time

was spent in listening to testimony which it had requested. Three episodes in this interval, two relating to the same subject, are attacked.

(1) *Alleged interference with the jury by newsmen.* On Friday afternoon counsel for Justice Keogh brought to Judge Weinfeld's attention that, as he had been informed, photographers and television camera men crowded around the jurors and took their pictures when they left the courthouse late on Thursday night and for lunch on Friday, and "some of the newspapermen were running along beside the jury asking them questions;" he thought it was "the marshal's duty to see to it that it doesn't occur." Government counsel made a similar report and expressed similar concern. The judge shared the concern and stated he would speak to the United States Marshal; no suggestion was then made that he ought declare a mistrial, although Keogh's counsel was to urge this as an additional ground on the motion for a mistrial made that evening on exception to the judge's giving the "Allen charge." After a brief interval the judge recalled counsel and told them, apparently to their complete satisfaction, that he had talked with the Marshal and been assured that such incidents would not be allowed to recur. There is no suggestion that they did.

Appellants assert these facts bring the case within the holding in *Remmer* v. *United States*, 347 U. S. 227, 229 (1954), that "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the

court and the instructions and direction of the court made during the trial, with full knowledge of the parties." But the facts of the *Remmer* case, particularly as these are spelled out in the Supreme Court's subsequent opinion, 350 U.S. 377 (1956), are so different as to make its holding inapplicable. In *Remmer* a juror had received a bribe offer from the defendant which he had reported to the judge, and then had been interviewed by the F.B.I.; the combined effect of the two incidents could well have impaired his freedom in voting. Here there was nothing to indicate that the fleeting remarks of the newsmen, whatever they were, would have frightened or overawed a juror. See *United States* v. *Catalano*, 231 F. 2d 67 (2 Cir. 1956). We do not take lightly such interference with the proper conduct of trials; if camera men and reporters will not police themselves to prevent such annoyance of jurors, and the marshals are unable to police them effectively, sterner measures will be required. However, we see no basis in this episode for setting aside a verdict rendered more than a day after the last of the alleged disturbances—especially when counsel for all parties were apparently satisfied with the measures taken by the judge to put the situation in hand.

(2) *The "Allen charge."* Late in the evening of Friday, June 15, the foreman of the jury sent a note to the court saying "We find it impossible to come to an agreement." [17] The jury having returned to court, the judge addressed them. He referred to the foreman's note as expressing a "desire to discontinue your efforts." He said "It is

17 The judge did not show the note to counsel, although he had it marked as a court exhibit.

desirable if a verdict can be reached that this be done both from the viewpoint of the defendants and the Government", but that this was true only if the verdict "reflects the conscientious judgment of each juror and under no circumstance must any juror yield his conscientious judgment." He noted that "This Court has no purpose to ask and indeed does not have the right to inquire as to how you stand. But considering the length of the trial, the amount of testimony that was taken, the number of witnesses that have been heard, further consideration on your part is fully justified." The judge said in amplification that, considering the time devoted to the reading of testimony and to meals, "you really have not spent more than eight or nine hours in actual deliberations and I do not consider that a sufficient time to have elapsed to permit you a full and fair opportunity not only to review the evidence but to discuss and consider amongst yourselves the various phases of the evidence."

After these and other remarks of like tenor, the judge stated that he wanted "to read to you a statement which is contained in a Supreme Court opinion which is fairly well known to bench and bar called the Allen charge * * *." He then read the familiar statement, 164 U. S. 492, 501 (1896), remarked that it would be best if the jury adjourned its deliberations until morning, and concluded that "It has been a long trial and a trial, as I say, where I am satisfied each side prefers finality of judgment if it can be obtained on the basis of a conscientious reflection of each juror's final vote." Exceptions of defense counsel were overruled and a motion for a mistrial denied; however, the judge recalled the jury and again emphasized, in a variety of ways, that "if any individual juror still retains a con-

scientious view that differs from that of other jurors, * * * you are not to yield your judgment"; "you are not to yield your judgment simply because you may be outnumbered or outweighed," etc.

Quite early on Saturday morning the jury requested a copy of the indictment and two exhibits relating to Kahaner. At 12:30 P. M. it made another inquiry, relating to a Keogh exhibit. After lunch, at 3:20 P. M., it asked for a reading of Judge Rayfiel's testimony, exhibits relating to the pleas and sentencing of the three defendants in the criminal bankruptcy case, and "Allen charge as read to us last night by your Honor." Judge Weinfeld complied with the last request by reading from the Supreme Court's opinion, but again added the caution that "your final vote must be only for that verdict which accords with your individual judgment, based upon the evidence and the law."

This recital of the facts suffices almost without more to dispose of the characterization, made by one of the appellants, that "The jury was being coerced by being subjected, in these circumstances, on two separate occasions to the 'dynamite' *Allen* charge." On the contrary, if the charge is to be given at all, we do not see how this could be done with less tendency to coercion or more emphasis on the need for conscientious individual agreement than in the way Judge Weinfeld did it.[18] To say that the jury

---

18 Recent cases from other Circuits are distinguishable as involving charges that "went beyond" the language of the *Allen* case in urging the jurors to resolve their differences. See *United States v. Rogers*, 289 F. 2d 433, 434-37 (4 Cir. 1961); *Powell v. United States*, 297 F. 2d 318 (5 Cir. 1961); *Green v. United States*, 309 F. 2d 852 (5 Cir. 1962). It is true that some of our colleagues in the Fifth Circuit have expressed in dicta or dissenting opinions doubt whether even the *Allen* charge *simpliciter* should ever be given. *Green v. United*

was twice "subjected" to the charge is scarcely accurate: on the second occasion it was the jury itself that asked for rereading of the charge, and it was quite natural for the judge to comply with the request, as the absence of any objection or exception by defense counsel confirms. We readily agree with appellants that the circumstances strongly suggest that the jurors were debating just what the *Allen* charge said—without, however, accepting appellants' conclusion that there was any impropriety in the jury's seeking to settle the argument by the sensible course of asking to hear it again. The case does not present even such evidence of "dynamite" as is sometimes asserted to exist when a verdict follows almost immediately after the giving of the *Allen* charge; the jury continued to deliberate all morning and well into the afternoon, twice asking for pertinent exhibits, returned in mid-afternoon requesting highly relevant material and the rereading of the *Allen* charge, and then deliberated for another several hours in the light of all it had heard and received.

We are likewise unable to follow appellants' argument that the giving of the charge, or at least the response to the jury's request for its repetition, was unlawful "because the Court could not help but know that the jurors still were in disagreement and that a minority existed," thereby

---

States, supra, 309 F. 2d at 854 & ns. 1-3; *Huffman* v. *United States*, 297 F. 2d 754, 759 (5 Cir.) (Brown, J., dissenting), cert. denied, 370 U. S. 955 (1962); *Andrews* v. *United States*, 309 F. 2d 127, 129 (5 Cir. 1962) (Wisdom, J., dissenting). We respectfully disagree. Giving the charge itself has often—indeed recently—been upheld in this Circuit, *e.g.*, *United States* v. *Thomas*, 282 F. 2d 191, 195 (2 Cir. 1960); *United States* v. *Tolub*, 309 F. 2d 286, 289-90 (2 Cir. 1962), and this is *a fortiori* permissible when it is diluted, as it was here, with additional warnings that no juror should give up his individual conscientious judgment.

making applicable the rule of *Burton* v. *United States*, 196 U. S. 283, 307-8 (1905), and *Brasfield* v. *United States*, 272 U. S. 448 (1926), finding error in an inquiry by the judge as to the numerical division of the jury, a rule which we applied in *United States* v. *Samuel Dunkel & Co.*, 173 F. 2d 506 (2 Cir. 1949), where the inquiry was whether there was "a pronounced majority." We have been cited to no case where this rule was applied in the absence of an inquiry by the judge. Here the court not only made no such inquiry but expressly told the jury that it had "no purpose to ask and indeed does not have the right to inquire as to how you stand." To say that the *Allen* charge, which speaks in terms of the consideration that needs to be given by a dissenting juror "if much the larger number were for conviction" and of the minority's duty "to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority," cannot be given if the judge has any reason to believe that the jury's division is other than even, defies ordinary sense.

Appellants' final contention is that even though we should hold that no one of the matters here considered would alone call for reversal, we must view their points not separately but in combination. That is peculiarly true with respect to a jury trial where there was such real basis for the existence of reasonable doubt and the consequences of a wrong verdict are so tragic. But this was not at all a case where errors, though minor, were numerous. In the long period of the trial prior to the charge, we have noted but one item calling for criticism—and that of the prosecutor and not of the judge; we have

found no errors by the judge in the period during the jury's deliberation and scarcely any—and these not excepted to—in the charge. Absolute perfection in trials will not be attained so long as human beings conduct them; few trials of this length and difficulty can have been so nearly free of error as this one. Although the closeness of factual issues bears directly on the magnitude of error required for reversal, the command of Congress that "On the hearing of any appeal * * * in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties," 28 U. S. C. § 2111, applies to great causes as well as small. In a case so long and hard-fought as this an appellate court must be careful lest "the perspective of the living trial is lost in the search for error in a dead record," *Glasser* v. *United States*, 315 U. S., *supra*, at 88 (Mr. Justice Frankfurter dissenting). The number of claims of error we have thought it right to discuss in this opinion has been due, not to misconduct of the trial by the able and conscientious judge, but rather to the acumen and assiduity of devoted counsel for the defendants in raising points for our consideration, and also to our own desire, because of the special poignancy of this case, not simply to consider these, as we would in any event, but to state the results of our consideration more fully than we should ordinarily deem appropriate. We hold that the issue of defendants' guilt was placed before the jury in a manner that was fair and in accord with applicable rules of law; our writ runs no further.

The judgment is affirmed.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of April one thousand nine hundred and sixty-three.

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ELLIOTT KAHANER, ANTONIO CORALLO,
JAMES VINCENT KEOGH,
Defendants-Appellants,

ROBERT M. ERDMAN, SANFORD J. MOORE,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION THEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Opinion on Petitions for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 253—October Term, 1962

(Petitions for rehearing, filed May 8 and May 10, 1963
Decided May 27, 1963)

Docket No. 27784

UNITED STATES OF AMERICA,

Appellee,

v.

ELLIOTT KAHANER, ANTONIO CORALLO and JAMES VINCENT KEOGH,

Appellants.

Before:

CLARK, WATERMAN and FRIENDLY, *Circuit Judges.*

ON PETITION FOR REHEARING AND FOR STAY OF MANDATE

PER CURIAM:

The petitions for rehearing point out two respects in which our opinion of April 25, 1963, was incomplete.

The discussion (pp. 1831-32) of the exclusion of testimony by Justice Keogh on the practice of other judges in the Eastern District of New York as to receiving presentence information when he was United States Attorney failed to mention the sustaining of objections to a question addressed to him whether, after his retirement from that post, he had discussed this practice with judges in the Eastern District, and to questions addressed to another state court judge, called as a character witness, whether he had ever spoken to a federal judge before sentencing concerning a man whom he did not represent, and the rejection of an offer to prove that two judges in the Southern District considered it "proper and legal to receive information concerning the family background, status and economic condition of persons about to be sentenced privately and from sources other than the presentence report or governmental agencies." But we hold that the trial judge was warranted in excluding such evidence, the two latter items of which were even more remote and more likely to open up collateral issues. As we pointed out, the Government made no claim of impropriety in Justice Keogh's luncheon conference with Judge Rayfiel (although, on his own testimony, he had no information of substance concerning Moore to impart) unless Keogh was acting for a corrupt motive, and Judge Weinfeld charged that all counsel agreed the jury could not find Keogh guilty unless they were convinced that money was paid to him.

The other item is that our discussion of the alleged interference with the jury by newsmen (pp. 1852-53) omitted a statement by Keogh's trial counsel that on Friday evening, June 15, after the judge's instructions to the marshal,

"when we went out to dinner, there were cameramen there. I had to ask them to go away, they wouldn't go away." This in no way affects the point that there was no evidence of further questioning or other harassment of the jury after the incident on Friday noon.

Save for these corrections, the petitions for rehearing, insofar as they seek action by the panel, are denied. Issuance of the mandate is stayed until the entry of an order on the petitions for rehearing in banc. If such petitions should be granted, the mandate will be further stayed until final determination; if they should be denied, it will be stayed for thirty days from the date of such denial and thereafter if within that time a certificate is received from the clerk of the Supreme Court of the United States as to the filing of a petition for certiorari etc. as provided in Rule 28(c) of this Court.

APPENDIX D

Constitutional Amendments, Statutes and Rule Involved

The Fifth Amendment to the Constitution of the United States provides:

> "* * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *"

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *"

18 U.S.C.

§ 371. *Conspiracy to commit offenses or to defraud the United States.* If two or more persons conspire to commit any offense against the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000, or imprisoned not more than five years, or both.

* * *

§ 1503. *Influencing or injuring officer, juror or witness generally.* Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States or officer who may be serving at any examination or other

proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000, or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

Federal Rules of Criminal Procedure:

Rule 52. *Harmless Error and Plain Error*

* * *

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement	3
Argument	10
Conclusion	22

CITATIONS

Cases:

Allen v. *United States*, 164 U.S. 492	13
Glasser v. *United States*, 315 U.S. 60	20
Remmer v. *United States*, 347 U.S. 227	12
United States v. *Maggio*, 126 F. 2d 155, certiorari denied, 316 U.S. 686	15
United States v. *Murray*, 297 F. 2d 812, certiorari denied, 369 U.S. 828	15

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 227

ANTONIO CORALLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 303

JAMES VINCENT KEOGH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 304

ELLIOTT KAHANER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (V. 1-48)[1] is reported at 317 F. 2d 459. Opinions of the district court (III 469-486, 487-493) are reported at 203 F. Supp. 78 and 204 F. Supp. 921.

JURISDICTION

The judgment of the court of appeals was entered on April 25, 1963 (V. 49). Petitions for rehearing were denied on May 27, 1963 (V. 99-103). The petition for a writ of certiorari by Corallo (No. 227) was filed on June 21, 1963. Mr. Justice Harlan extended the time of petitioners Keogh and Kahaner for filing petitions for writs of certiorari to and including July 26, 1963, and separate petitions (Nos. 303 and 304) were filed by them on July 25, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was such improper interference with the jury during its deliberations as to require declaring a mistrial because, on being escorted to eat, the jurors passed through a crowd of newsmen and photographers who asked questions and took pictures,

---

[1] The certified record is in five parts. Volume I consists of Keogh's appendix and is referred to as "I.". Volume II consists of Kahaner's appendix and is referred to as "II." Volume III consists of Corallo's appendix and is referred to as "III." Volume IV consists of the government's appendix and is referred to as "IV.". Volume V contains the proceedings in the court of appeals and is referred to as "V".

there being no claim that the jurors answered any questions.

2. Whether giving a modified "Allen" charge was proper in the circumstances of this case.

3. Whether the charge to the jury, including a summary of the evidence, was fair.

4. Whether it was reasonable for the F.B.I. to examine petitioner Keogh's telephone message book during an interview with his clerk who was instructed by Keogh to furnish any information requested.

5. Whether a statement by a witness whose trial testimony was limited to the procedure for keeping messages and identifying a message book was producible under the Jencks Act, where the witness also testified for the defense.

6. Whether the evidence was sufficient to support the verdict.

STATEMENT

Petitioners[*] were convicted by a jury in the United States District Court for the Southern District of New York of conspiring to obstruct the due administration of justice by improperly attempting to influence the outcome of a criminal prosecution in the United States District Court for the Eastern District of New York (III. 9, 13-20). Each was sentenced to imprisonment for two years, subject to being paroled at any time at the discretion of the parole board (IV.

[*] Two other defendants, Erdman and Moore, were severed for purposes of trial (III. 7) and testified for the government.

248). The convictions were unanimously affirmed (V. 49).

The evidence showed that on January 5, 1961, co-conspirator Moore, and five others, including one Cohen, were arrested in the Eastern District of New York on charges of concealing assets from the trustee in Bankruptcy of Gibralter Amusements, Ltd. (IV. 59; see III. 14), a corporation dominated by Moore (IV. 173). Cohen's cousin, Seymour Deutsch, talked with Dr. Erdman about helping his relative. (IV. 126). Erdman in turn called petitioner Kahaner, a friend and patient, who at that time was the Chief Assistant United States Attorney in the Eastern District of New York (IV. 126-127, II. 250-251). During January Kahaner ascertained that it had been tentatively decided to seek indictments against three of those arrested, including Moore (IV. 114). When Deutsch, pursuant to an appointment made by Erdman, met with Kahaner to discuss the position of Cohen, Kahaner advised him to have his cousin and two other employees give statements to the government (IV. 129).

During January Moore met with Erdman and discussed the possibility of paying $60,000 to a lawyer, but Erdman persuaded him to bring in the papers so that Erdman could see what could be done (IV. 59-61, 134-135). In the middle of February, Kahaner called Erdman and said he wanted $35,000, in return for which he promised that three would not be indicted and, as to the remaining three, who would be indicted, "he would see to it that they were treated

softly by having the case * * * brought before a specific judge in April * * *" (IV. 7). Erdman called Deutsch to relay the information to Moore that something could be done for $35,000 (IV. 7, 130). Shortly thereafter, Moore, Deutsch and Cohen met in Erdman's office, where Erdman explained the proposition. It was suggested that petitioner, Corallo, hold the money "to insure the contract" (IV. 131, 7-9, 64-66). Later, at a meeting with Moore and Erdman, Corallo expressed the opinion that Moore should follow Kahaner's advice (IV. 10-11). It was decided that $15,000 would be paid in advance and that Corallo would hold $20,000 in escrow to be paid when the matter was satisfactorily concluded (IV. 11). Within 24 hours after Erdman informed Kahaner that Moore "was going along", Kahaner telephoned Erdman for part of the money (IV. 11-12). Erdman made arrangements for Moore and Kahaner to meet in his office on February 21, 1961. Two days after the meeting, Moore left at Erdman's office an envelope with $5,000 which Kahaner picked up (IV. 12-14, 67-68).

On February 24, 1961, the grand jury indicted three men in the *Gibralter* case, one of whom was Moore (IV. 14, 115-116). Shortly thereafter, Kahaner told Erdman by telephone that much pressure was being applied against Moore, and that Erdman should speak to petitioner Keogh (IV. 14-15), a judge of the New York Supreme Court (I. 649). Keogh had known Erdman since 1956 and had known Kahaner for approximately ten years (I. 639, 648; IV. 2; II. 269). After a meeting with Moore and Corallo in which Corallo said Erdman "should go to see the

brothers",[3] Erdman visited Judge Keogh, taking a copy of the indictment (IV. 15). Moore drove him over, but only Erdman went into the Judge's chambers (IV. 16). The judge, after scanning the Moore papers, began speaking of his financial problems and gave Erdman a card (Govt. Ex. 1), listing in his handwriting various remodeling expenses totaling $9,027 (IV. 16-17).[4] When Erdman asked whether he could do anything, Judge Keogh replied, "Don't worry" (IV. 17). Erdman later showed the card to Moore (IV. 18, 71-72).

On March 2, Kahaner telephoned Erdman and told him everything would have to be hurried since Judge Rayfiel had been transferred from the April session to the March session. Kahaner said that a quick probation report would cost $500 and that he wanted another payment (IV. 18). Erdman related this to Moore, who brought Erdman $10,000 in two envelopes (IV. 18-19, 71). Erdman gave one envelope to Kahaner at Erdman's office and the other to Keogh in his chambers (IV. 19). Upon receiving the envelope, Keogh told Erdman not to worry and gave him another card with the figure 3500 (Govt. Ex. 2) which he said he would like to have as quickly as possible (IV. 19-20).

---

[3] Petitioner Keogh and Congressman Eugene J. Keogh are brothers (I. 628).

[4] At the bottom of the card Erdman had written "[T]empler" (IV. 16), as a reference to a model of automobile (IV. 18). Keogh purchased a "Tempest" model Pontiac on April 12 (I. 655-656).

Meanwhile, Kahaner told Williams, who was the assistant in charge of the *Gibralter* case, that the defendants would plead guilty. Williams communicated with Moore's lawyer, Becker, who denied that his clients would plead guilty. However, on March 9, all those indicted in the *Gibralter* case entered pleas of guilty before Judge Rayfiel, to the surprise and over the objection of their attorney. Sentence was set for March 30 (IV. 116-118, 139-140, 72; III. 305).

In the middle of March, Erdman arranged for Moore and Corallo to meet Kahaner. Corallo told Kahaner that Moore was important to him and that Kahaner should "[k]eep him on the street" (IV. 21-22). Later Kahaner telephoned Erdman for more money (IV. 22). On March 29, Moore and Erdman met Kahaner at a coffee shop and gave Kahaner $2,500 of the remaining $20,000 (IV. 24-25, 75-76). Moore and Erdman then drove over to see Judge Keogh. Erdman went in alone, gave Keogh the balance of the $20,000 and reminded him that the sentencing was the next day. Keogh said "Don't worry". Judge Keogh had lunch with Judge Rayfiel that day (IV. 26, 76-77, 166). Judge Rayfiel testified that Judge Keogh told him that a good friend of Moore's had told Keogh what a fine fellow Moore was and wondered whether leniency could be extended. Judge Rayfiel told Judge Keogh that the probation report indicated that leniency was not merited (IV. 166).

That afternoon, Keogh told Erdman by telephone that Judge Rayfiel had received a lot of pressure from other judges, there was a lot of talk about

Moore's "connections", and that they were all going to get sentenced (IV. 26). Erdman then asked Moore about his connections with the underworld, and told him about the pressure from the two judges who had informed Judge Rayfiel of the "talk" that Moore was going to get a suspended sentence (IV. 27, 77-78). After various telephone calls, Keogh arranged for Erdman to see Judge Rayfiel at 9:30 the next morning (IV. 27).

On March 30, at 9:30 a.m., Erdman saw Judge Rayfiel who told him that no leniency could be expected (IV. 28, 167). Erdman and Becker (Moore's attorney) then went to see Keogh (IV. 29, 143). Becker was excused from the room (IV. 143). Erdman also saw Kahaner, who went to see Judge Rayfiel's secretary, and said he was going to tell the assistant in charge of the case not to object to a motion to withdraw the plea (IV. 30). Judge Rayfiel overruled the motion to withdraw the pleas, and imposed sentences of three years' imprisonment on Moore, and lesser terms on the others (IV. 121, 141).

When Moore informed Erdman of the sentences, Erdman telephoned Judge Keogh, who claimed this was the third time that Judge Rayfiel had disappointed him (IV. 31). Corallo asked Erdman to give the money back (IV. 82, 152). Later, when Kahaner, Corallo and Moore met in Erdman's office, Kahaner, who complained that he was the only one who had done anything, suggested that perhaps they could work something out by making restitution (IV. 32-33, 83-84). Kahaner again asked for more money

but finally said he would help because of his friendship with Erdman (IV. 83, 33).

On April 5, 1961, Kahaner, Erdman, and Keogh had lunch together in the Brooklyn Club where they discussed restitution and the possibility of having the sentence reduced (IV. 33-34). In May, Moore, Erdman, and co-conspirator Forman, who had arrived from England on April 30,* met with Keogh in his chambers and told him they were having difficulty with Mr. Jaspan, who was the attorney for the trustee (IV. 35-37, 87-88, 154, 160-162). Jaspan testified that during a trial early in May, Judge Keogh called him to the bench and inquired about the *Gibralter* case, saying that Mr. Erdman and he would like to know what was happening. Jaspan told Keogh they were awaiting a written offer of restitution (IV. 176). On May 22, Jaspan, Moore, Erdman and Forman attended a meeting in Judge Keogh's chambers and discussed a settlement offer of $50,000 which was to be guaranteed by notes of Moore, endorsed by Erdman (IV. 177-178). At this meeting, Judge Keogh reviewed the settlement letter and struck out a provision conditioning the offer on a satisfactory disposition of the criminal matter, stating that that would make Judge Rayfiel "angry all over again" (IV. 89-90, 37-41, 163). On Judge Keogh's advice that Judge Rayfiel "was mellowing" (IV. 41), Erdman co-signed the notes and Jaspan

---

*Before the grand jury, Keogh had insisted he met Forman on March 29 and had made a note of his name (IV. 241-245).

called a conference with Judge Rayfiel, which Kahaner attended. When Jaspan told the judge of the restitution, Judge Rayfiel said he would entertain a motion to reduce the sentence and would continue the bail pending determination of the motion (IV. 184-185, 145-146, 168-170).

During May, Corallo told Erdman that he, Corallo, was responsible for a portion of the money and hoped to get it back (IV. 56-57). In June, when Erdman gave Judge Keogh a one thousand dollar check, the judge said he hoped that Erdman had not made any definite commitments to Moore, and also hoped that Moore did not know that he, Keogh, was receiving part of the money (IV. 43). In July, when Erdman expressed concern because Moore and Forman felt they should get their money back, Kahaner said "Let them prove it. You don't want to get yourself involved" (IV. 44-45).

ARGUMENT

The detailed and careful opinion of the court of appeals (V. 1-48) adequately disposes of most of the points raised in the petitions. Accordingly, on several of the issues we shall confine ourselves to a relatively brief statement.

1. The jury started their deliberations at 3:50 p.m. on June 14, 1962 (I. 762, 853). The following afternoon, counsel for Judge Keogh complained that he had received information "that last night as the jurors left there were, of course, television cameramen downstairs and other photographers, and again, today at lunch, the press seemed to go entirely berserk about

it. They were not only taking photographs of the jurors as they were walking but some of the newspapermen were running along beside the jury asking them questions". The judge stated that this was the first he had heard of the matter. He said "I don't have the slightest doubt that none of these jurors answered any question that was put to them and I am sure you are not suggesting that. Indeed I don't know that in fact any juror was questioned or that any attempt was made to talk to any juror" (I. 864-865; III. 436-437). In response, counsel merely said "I just don't think it is right". The judge agreed and said he would see that "nobody gets near the jurors, not even within speaking distance" (I. 865; III. 437). He offered to call in the newspapermen and tell them not to approach the jurors, but expressed doubt as to whether this would exacerbate or ameliorate the situation. Defense counsel said he did not know (I. 865). There was a suggestion by defense counsel that the jurors be taken by bus. The judge said he would talk to the marshal and wanted counsel to wait for the marshal to come, but counsel declined to do so. Later the judge reported that the marshal had assured him that reporters would be kept from the jurors (I. 866-867; III. 437-439).

The only other reference to this matter was the same evening when, in the course of a motion for a mistrial, counsel for Judge Keogh said: "I pointed out to the Court the incidents that happened when the jury went out to lunch and the reporters pouring questions at jurors—I don't know what they asked

and I don't know what they said. * * * I believe with this constant importance of the case and the action of the press and the television cameras last night, today, at lunch, there were even at night when we went out to dinner, there were cameramen there. I had to ask them to go away, they wouldn't go away" (I. 874-875; III. 447-448).

It is thus evident that no one disputed the judge's assumption that the jurors had not answered any questions. And every indication is that the questioning ceased (albeit the cameras continued to photograph) after the measures taken by the judge as soon as the matter was first brought to his attention. In any event, assuming newspaper reporters did ask questions of the jurors as they left the building in a group for lunch, this circumstance would not taint a verdict. They were not private communications, such as those involved in *Remmer* v. *United States*, 347 U.S. 227. Nor could they be said to amount to undue pressure. In view of the public position of one of the defendants, the jurors could hardly have been unaware that the press and public were interested in the case.

2. As noted, the jury began deliberating on the afternoon of June 14, 1962 (I. 762, 853). During the course of their deliberations there were numerous requests for exhibits and for the re-reading of portions of the charge and testimony (see I. 854-864, 877-878, 880, 884-888). At 10:40 p.m. on June 15, the court stated (I. 870), "Members of the jury, I have a note from you in which you suggest that you desire to discontinue your efforts" (See note, II. 429).

The judge then remarked that, although this was the second day, relatively little time had been available for actual deliberation. He suggested that further discussion and consideration might lead to a change of view, but emphasized that no juror was to vote for any verdict which did not represent his considered judgment (I. 871-872). Thereafter he read the "Allen" charge (from *Allen* v. *United States*, 164 U.S. 492) and suggested they retire for the night and resume again in the morning (I. 872). Counsel for Keogh complained that, although the jurors were told not to yield their conscientious judgment, the judge had given the *Allen* charge afterward. He said, "Had you done it in the reverse, we could have no quarrel in that regard" (I. 874). Accordingly, the court brought the jury back and reiterated his charge that the each juror was not to yield his judgment if he had a conscientious view that differed from that of other jurors (I. 875-876). The following afternoon the jurors made several requests, including one for a rereading of the *Allen* charge. The judge complied but again admonished that each juror's vote must reflect his conscientious view without regard to the vote of any other juror (I. 887). No objections were then expressed by counsel. There was no intimation as to the numerical division of the jury, either before the charge or before the jurors requested it reread; in fact the trial judge specifically told the jury that he would not ask how they stood (I. 871).

In the circumstances of this case, giving the *Allen* charge was fully justified, particularly since the judge modified the charge as approved in that case to

stress the duty of each individual juror to his own conscience. In any event, the only objection raised by counsel was accepted by the trial judge.

3. All petitioners complain about the summary of the evidence in the charge to the jury. The court below has made a detailed analysis of most of these complaints and found them wanting. A reading of the charge shows that it was eminently fair. The judge expressly warned the jury that his summary would not be complete and that it was the jury's recollection, and not his own, which was to govern. He said (I. 816):

> Thus, in broad outline, I have sketched the evidence and the contentions of the prosecution and defense. It will readily occur to you that there is much evidence and testimony of other witnesses to which I have not adverted.
>
> My failure to touch upon other evidence is no indication that it has been disregarded or that I am placing emphasis upon such testimony to which I referred. The broad review of the evidence was to focus attention upon some of the issues, disputed issues of fact to be considered by you. You will understand that all evidence in the case is important and must be considered by you.

The judge repeated the admonition as a supplementary charge just before the jury retired to deliberate (I. 850). In any event, there were no serious omissions in the court's summary of the evidence.

a. Petitioners Keogh and Kahaner complain (No. 303, pp. 17-23; No. 304, p. 20) that the judge failed to charge on the main theory of the defense, that

Erdman received the money and kept it or that no money ever changed hands. However, the Court unmistakably charged the jury that the "basic issue in the case is whether the money was paid over to Keogh or Kahaner" (I. 818), and he mentioned a number of times that these two defendants denied receipt of the money (I. 798, 799, 806, 807, 808, 809, 810, 811). The judge quite properly left the details of the argumentation to counsel. It was sufficient to tell the jury, as he did, that "counsel, during the course of their summation, referred to various matters which they stressed and believed were important and to which I did not refer, and, of course, you will bear those matters in mind" (I. 850).

b. Corallo complains that in the charge the judge cited as evidence Moore's grand jury testimony as to one of the meetings, which differed from his trial testimony (No. 227, pp. 10-12). The fact is that, at trial, this grand jury statement was specifically limited to the issue of Moore's credibility (III. 238).[*] In restating the government's evidence the court correctly summarized the testimony of Erdman as to the meeting. The judge noted that Moore "acknowledged" certain statements by Corallo before the grand jury but that "at this trial, Moore testified he had no

---

[*] The difference between Moore's trial and grand jury testimony as to Corallo justified the ruling of the trial court in permitting the government to cross-examine him on the basis of his grand jury testimony. *United States* v. *Murray*, 297 F. 2d 812 (C.A. 2) certiorari denied, 369 U.S. 828, *United States* v. *Maggio*, 126 F. 2d 153 (C.A. 3), certiorari denied, 316 U.S. 686.

recollection thereof" (III. 369). This was not a reference to the testimony of Moore as evidence. Furthermore, in summarizing Corallo's defense, the court referred to "the inconsistencies among the government witnesses; noted that Corallo "emphasizes Moore's testimony, contradicting Erdman as to events in which he allegedly was involved"; and summarized Moore's testimony at the *trial* in this respect (III. 387). Thus, the charge fairly put Moore's testimony with respect to Corallo before the jury.

4. There is no merit in Kahaner's complaint that the failure of the government to turn over the statements of two minor witnesses requires reversal (No. 304, pp. 37-38).

a. Rose Kippe, Kahaner's former secretary, was called as a government witness to identify a telephone message book and to explain how the messages in the book were recorded and information given to Kahaner (IV. 213-217). A statement given by Mrs. Kippe when she was interviewed was not turned over on the belief that it did not relate to her very limited, undisputed testimony. Thereafter, the defense called Mrs. Kippe as a defense witness and the government made slight use of the statement she had given (II. 312). The court of appeals examined the statement and found that non-production was harmless (V. 23).

b. The government called Dr. Miller as a rebuttal witness to show that the "doodling" in Kahaner's diary covered up references to Erdman (IV. 234-241). On appeal, counsel for Kahaner requested a statement as to whether the government had any reports by him or by another witness. There were

none as to the other witness, but as to Dr. Miller it was discovered that he had made a report of his laboratory findings to the F.B.I. on the day preceding his testimony (V. 24). Since this was merely a summary of his scientific findings, the court below found the non-production to be harmless error.

In this extensive trial, where the government at the outset agreed to produce statements without a demand therefor, the minor matters now complained of were of no significance.

5. Petitioner Keogh's claim that there was an illegal search and seizure when government agents examined the telephone message notebook while interviewing his staff (No. 303, pp. 23-27) is refuted by the record.

At the conclusion of the government's direct case, it sought to introduce into evidence various loose leaf telephone message logs kept by Keogh's clerks to record messages received while the judge was not available. For that purpose the government first called Max Benjamin, one of the clerks. Before the examination had progressed very far, the trial judge decided to take evidence in the absence of the jury (IV. 217-219). The court indicated that the question was whether Keogh had waived his constitutional privilege to refuse production, and characterized the hearing as "almost in the nature of a motion to suppress" (IV. 221).

Keogh's counsel stated that if the defense had to proceed, his client would testify and the records would then be available, but he did not know why he should produce them as part of the government's case (IV. 220).

Benjamin testified that Keogh told him in front of the F.B.I. agents to "[t]ell them everything they want to know and be cooperative with them" (IV. 219, 224-225). During the course of the interview the agents asked the clerks whether notes were kept of telephone messages. Benjamin showed them the current book and they "skimmed through the pages" (IV. 225). Agent Maher testified that Keogh had told his clerks that the F.B.I. was going to interview them and "he wished that they would cooperate and furnish any information that we requested" (IV. 228). The government withdrew its request for the production and admission of the books (IV. 229) and the judge remarked that the government was well advised to do so since he had always strictly construed a claim of waiver of a constitutional right (IV. 229).

Thereafter, Keogh's counsel asked for a hearing to determine what information had been obtained from the telephone logs and the extent to which it had been used for further investigation so that a proper motion could be made to strike out testimony flowing therefrom (IV. 229-230). The judge denied the request, noting that no motion to suppress had been made until that time, the fourth week of trial, when the government was about to rest its case. The court said (IV. 232-233):

> I did say that my own view has always been to hold that a waiver of constitutional rights must be clearly made. That is all I said. I did not say and didn't suggest that there was any illegal search here. The fact of the matter is

> that there may be others who would, and perhaps properly, construe a statement made by the defendant Keogh to the two people on the staff, as I recall the language, that they should cooperate and furnish any information requested by the agents, to cover the turning-over of books, but since there was no express reference to books and or records, I expressed myself as I did. Moreover, the statement to his employees that they furnish any information requested by the agents, it would seem to me, would fully justify these employees looking at any records and acquainting the agents with whatever information is in those records, apart from their personal knowledge.

When Judge Keogh took the stand he admitted that, after the interview, his clerk had told him that the agent had "thumbed through" the telephone messages (I. 700). The pertinent message slips were introduced as part of the defense (see I. 650-700).

It is evident that Judge Keogh adopted the strategy of exhibiting full cooperation. Whether or not he irrevocably waived his right to withhold the notebook, the inspection made by the agents, with the consent of the judge's clerk, acting on his instructions to cooperate, was plainly authorized. Accordingly, there was no occasion to suppress whatever information may have been derived from that perusal of the record. The fact that the government did not press for the admission of the telephone logs was not an admission of wrongdoing. Since the defense had made clear that the judge was going to offer these in evidence if he took the stand (and actually did so) the

government was justified in abandoning a time-consuming collateral hearing at this juncture of the case.

6. All petitioners in various ways question the sufficiency of the evidence to convict. However, the matter was fully and fairly presented to a jury which, by its requests for testimony and exhibits, indicated a conscientious effort to weigh all the evidence. They saw and heard the witnesses and found the explanations of Keogh and Kahaner wanting. The court of appeals has fully reviewed the evidence and found it sufficient. Since this Court does not reweigh the evidence or redetermine the credibility of witnesses (see *Glasser* v. *United States*, 315 U.S. 60, 80), it is sufficient to note that, as the Statement makes plain, none of these petitioners were mere bystanders, but all played important, although different roles, in this conspiracy to obstruct the due administration of justice.

While it is true that the basic thread of the conspiracy is supplied by accomplices, there are many points of corroboration. The telephone logs, the marked papers on the restitution plan, Judge Keogh's cards, the testimony of secretaries, and of the non-accomplice lawyers, Becker, Jaspan and Williams, all bolster the narrative of the government's principal witnesses. Corallo's suggestion (No. 227, pp. 12-13) that the evidence was inadequate ignores the testimony that it was not until Corallo gave his approval that Moore became involved in the scheme (IV. 11); that Corallo agreed to act as escrowee (IV. 11); that Corallo accompanied Moore to a number of important meetings with Erdman (IV. 15, 26-27,

110); that Corallo told Kahaner to keep Moore "on the street" (IV. 22); that Corallo told Erdman in May, 1961, that "he was responsible for a portion of the money and that he would hope to get it back" (IV. 56). As to the other two petitioners, the government's evidence, which the jury credited, showed deep involvement in a conspiracy to obstruct justice. Judge Keogh's argument that, even if he did receive money, he committed no federal crime in talking to Judge Rayfiel, because he did not offer money to Judge Rayfiel, ignores the element of corrupt motive. What the statute condemns is a corrupt attempt to obstruct the administration of justice. The jury, on sufficient evidence, obviously concluded that the scheme which Judge Keogh joined had such an evil purpose.

Because the case involves a judicial officer and a former official of the Department of Justice, we have reviewed the record with special care for this Court even though, as its opinion reveals, the court of appeals has already given the matter very careful consideration. We conclude, however, that there is no doubtful question which requires further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
THEODORE GEORGE GILINSKY,
Attorneys.

AUGUST 1963.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1963 698230 150

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 4 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 227

ANTONIO CORALLO,
Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY OF PETITIONER ANTONIO CORALLO TO UNITED STATES' BRIEF IN OPPOSITION

MICHAEL P. DIRENZO
253 Broadway
New York 7, New York
Counsel for Petitioner.

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

IN THE

Supreme Court of the United States

October Term, 1963

No. 227

ANTONIO CORALLO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY OF PETITIONER ANTONIO CORALLO TO UNITED STATES' BRIEF IN OPPOSITION

Petitioner Antonio Coralllo, makes the following reply to the Brief of the United States in Opposition.

1. It is the position of the petitioner that the circumstances under which the jury conducted its deliberations did not permit the free and untrammeled consideration to which the petitioner is entitled.

The Government in its Brief in Opposition (p. 12) states that no one disputed "the judge's assumption that the jurors had not answered any questions." The important facts are that the jurors were subjected to an oppressive atmosphere during its deliberations and unjusti-

fied contacts were had with the jurors during their deliberations. The reason nothing is known about the content of the communications to the jurors, or whether the jurors had answered any questions, is that the trial judge—in making an assumption contrary to the presumption of prejudice—failed to take the necessary steps to rebut the presumption of prejudice.

Of course the communications were not the *same* "as those involved in *Remmer* v. *United States*, 347 U. S. 227." But the assertion that the communications here involved were not "private" is merely a play upon that word. Indeed, the communications were private since they were addressed to the jurors, not to the public.[1] What took place here having newspapermen, "running along besides the jury asking questions," is not justified, as the Government argues, merely because "of the public position of one of the defendants."

Petitioner contends that *all* communications had with the jury during its deliberations are forbidden, except those of an official nature. It was the duty of the court to determine, by hearing or inquiring of the jurors,

1. There is a distinction between public communications which the jury might read or hear during trial and communications during the jury's deliberations, when the jury is in the custody of the Government to assure freedom from *all* communications public or private. Cf. *Near* v. *Cunningham*, 313 F. 2d 929, 933 (4th Cir. 1963), citing *Stone* v. *United States*, 113 F. 2d 70 (6th Cir. 1940), wherein the Court said: "* * * The presumption is always in favor of good character but the law concerning juries provides strictly that all jurors be secluded from outside influences and presumes that such influence may act upon some of them, and may act so as to be beyond detection. Jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained."

whether prejudice did *not* result, particularly in the circumstances of this case, where the trial judge found it necessary to have a side entrance opened for his own use (437a). The test for a hearing is not simply whether undue pressure has been exerted on the jury. This is not a case, like *United States* v. *Catalano*, 231 F. 2d 67, 68 (2d Cir. 1956), cited by the court below, where the subject matter of the "talk" was reported. Here, there "is no certainty that no harm has been done." *United States* v. *Campagna*, 146 F. 2d 524, 528 (2d Cir. 1944). Hence, the presumption of prejudice applies although ignored by both the court below and the Government.

2. The trial judge did not, *in his charge*, limit Moore's testimony as to his grand jury statement to the issue of Moore's credibility (Br. in Opp., 15). The trial judge specifically stated that Moore acknowledged before the grand jury certain statements attributed to Corallo. This could not be other than a reference to this *as evidence*, contrary to the assertion of the Government (Br. in Opp., 16). And because it was not evidence the trial court should not have told it to the jury in its charge. Thus the jury had improperly placed before it two prejudicial items: (1) Moore's testimony before the Grand Jury; (2) Moore's testimony that he had no recollection at the trial of what he had acknowledged before the Grand Jury. This was especially prejudicial in view of the trial judge's statement that he would "again refer to the matter" (369a). When the trial court "again" referred to this matter in its charge, it referred to the inconsistencies among the two Government witnesses, at the trial, Erdman and Moore. But this only emphasized the improper reference

to Moore's Grand Jury testimony to the obvious prejudice to the petitioner.

Accordingly, petitioner submits that his petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL P. DIRENZO
253 Broadway
New York 7, New York
Counsel for Petitioner,
Antonio Corallo.

Office Supreme Court, U.S.
FILED
SEP 9 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 227

ANTONIO CORALLO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

MICHAEL P. PIRENZO
253 Broadway
New York 7, N. Y.
Counsel for Petitioner

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

IN THE

Supreme Court of the United States

October Term, 1963

No. 227

ANTONIO CORALLO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

Petitioner, Antonio Corallo, respectfully petitions for a rehearing of the order of October 14, 1963, denying a writ of certiorari. By orders of November 7 and November 22, 1963, Mr. Justice Harlan extended petitioner's time in which to file a petition for rehearing to and including December 9, 1963. The instant proceedings for rehearing have not resulted in a stay of execution of petitioner's sentence of two years' imprisonment, no such stay having been sought; petitioner surrendered to begin serving his sentence on November 7, 1963, and he is presently incarcerated at Lewisburg.

I.

Petitioner, Antonio Corallo, is "the forgotten man" in this historic prosecution where prime attention has naturally focused upon his co-defendants of distinguished name. The elaborate opinion of the Court of Appeals affirming

the convictions contains relatively little mention of the Corallo sector of the case. This is understandable, on the one hand, in that it reflects the at-most peripheral implication of Corallo in the alleged happenings. On the other hand, this relatively minor attention which the Court below gave to Corallo in its opinion has the regrettable result of obscuring just how remote and tenuous was Corallo's alleged part in this case.

It is therefore our first respectfully tendered ground for rehearing that Corallo's conviction is, starkly, a miscarriage of justice on the sheer factual merits of the case—an injustice so fundamental as to entitle us to ask this Court to scrutinize the record once again, in the interests of the fair administration of Federal criminal justice. In asking the Court to do this we are not merely pleading for a "second chance" to argue our certiorari application, but we are making this request for specific reasons which seem to us meritorious and appropriate in the framework of a petition for rehearing:

Corallo was convicted solely on the testimony of accomplice witnesses. For all practical purposes, it is the testimony of two of these accomplices, Erdman and Moore, which formed the Government's case against Corallo.* But the difficulty with that "case" is that one of those two accomplice witnesses (Moore) flatly contradicted the other (Erdman) in so total a way that the Court below concluded that Moore "completely exculpated Corallo" (Pet. Cert. 27a).

* Even Erdman's testimony does not portray Corallo as one of the active "conspirators" but merely as at most an acquiescent or sympathetic spectator (Corallo App. 30a, 39a, 49a, 61a, 67a, 73a). The testimony of the accomplices Deutsch (Corallo App. 131) and Kerner (*id.* 150-153) added nothing of significance.

The situation thus presented is that the Government's "proofs" against Corallo completely cancelled themselves out. In other words, this is not the usual case of "conflicting evidence" where the defense proofs conflict with those of the Government. This is a case where the Government's own *probatum* accomplishes its own self-destruction under the rule of reasonable doubt—and indeed under the rule requiring the Government to prove a *prima facie* case for submission to the jury. The total self-contradictoriness in the Government's own case which here exists is to be evaluated, moreover, in the setting of accomplice testimony as the sole offered proof of guilt. Cf. the authorities collected in the "Reply Brief for Petitioner Elliot Kahaner", in No. 304 at this Term, where the evolution of the Federal rule as to corroboration of accomplice testimony is described, and the standards of corroboration are set forth.

There seems to be a dearth of authority on the question of the effect of conflict of testimony among the prosecution's own witnesses in criminal cases. In *People* v. *Nicosia*, 164 Misc. 152, 298 N.Y.S. 591 (Kings Co. Ct., 1937), the Court dismissed an indictment on the ground that the Grand Jury testimony of the two principal witnesses for the prosecution "is clearly inconsistent, and the burden is upon the prosecution to reconcile it, since the defendant is safeguarded with the presumption of innocence." The facts in *Nicosia* were far less favorable for the applying of this rule than is true in our case, where the inconsistency between Erdman and Moore is direct, total and decisive on the fundamental issue of guilt at all. The cases holding that the prosecution in a criminal case is not bound by the testimony of a witness whom it produces* seem to

* Eg., *United States* v. *Palese*, 133 F. 2d 660 (C.C.A. 3, 1943).

be confined to the Third Circuit; and, in any event, such decisions obviously do not reach the question of what evaluation shall be made of the Government's case by the Trial Court on a motion for acquittal where such conflict of testimony exists; nor, *a fortiori*, do such decisions reach the question of the evaluation of this kind of prosecutive *probatum* in terms of the rule of reasonable doubt. What we mean is that, even if the Government was not "bound" (whatever that word means) by Moore's exculpatory testimony in the instant case and was entitled to invoke the opposite testimony of Erdman, this still left the question of what the Trial Court in the first instance should have done about submitting the Government's totally self-contradictory case to the jury and about what the jury should have done under the rule of reasonable doubt.

We would respectfully also call to the Court's attention the suggestion advanced in the companion certiorari petition of Kahaner (No. 304) at page 34, as to the need for consideration by this Court of the proposals of Circuit Judge Jerome Frank in his concurring opinion in *United States* v. *Castro*, 228 F. 2d 807 (C.A. 2, 1956), that the Federal Trial and Appellate Courts should determine whether a criminal case is improper for submission to the jury when reasonable men could not differ in believing that a reasonable doubt exists. But even under the conventional rule that the test for submission of a Federal criminal case to a jury is merely that of "*prima facie*" or "preponderant" proof, the instant case against Corallo should never have gone to the jury, because it is difficult to imagine a more indubitable example of absolutely manifest "reasonable doubt" built right into the very heart of the Government's own case than that which emerged

upon the record in this trial, where one of the Government's two vital accomplice witnesses said in effect that the defendant was innocent and that the other accomplice witness was lying.

II.

The seriously doubtful basis of the condemnation of petitioner Corallo as above suggested, makes it pertinent for us to call the Court's attention also to the recent expressions, on the editorial page of the New York Times of Sunday, December 1, 1963, in which the Editors of the Times and seven distinguished professors of criminal law at the Harvard Law School (in a letter to the Times which is printed on the aforesmentioned editorial page) called for a new juridical recognition of the injustice of what amounts in effect to criminal "trial" in this country by the mass public communications media of the present era. The editorial and professorial pronouncements in the Times of December 1, 1963 were evoked by the national disaster of the recent Presidential assassination and the publicity features of the case against Lee Oswald. It is unnecessary to remind this Court of the anguishing circumstances of pretrial publicity, and of "media" interference with the jurors even during the latter's deliberations, in the instant case. The public clamor which attended this case from its outset, and the orientation of the public mind towards pre-judgment of the guilt of the defendants in this sensationalized case, may perhaps now be re-evaluated by this Court. With particular acuteness in the case of Corallo, these considerations seem deserving of this Court's attention. Corallo is, as we said at outset, the "forgotten man" in this notable case, where the crusade-like process of the avenging of the charged

wrong against Governmental morality may well have led the jurors to take insufficient note of the significant details (*pro* and *con*) of the Corallo portion of the trial proofs.

The letter of the Harvard Lawschool professors above referred to (N. Y. Times, December 1, 1963, p. 10 E, Col. 8) reads as follows:

"*To the Editor of The New York Times*:

The undersigned, teachers of the administration of criminal justice at the Harvard Law School, would like to commend The New York Times for its excellent editorial of Nov. 25, commenting on the deplorable incidents in the Dallas police station ending in the death of Lee Oswald.

From Friday, Nov. 22, through Sunday the shocking manner in which our processes of criminal justice are often administered was exhibited to ourselves and to the world. Of course, there was a legitimate concern of the public to know promptly that investigations had been completed and a single suspect apprehended, and that responsible authorities had sufficient evidence to justify his arraignment and indictment.

But surely this could have been satisfied without turning the process of investigation and accusation into what can only be described as a public spectacle, carried on in the Dallas police station with its halls and corridors jammed with a noisy, milling throng of reporters and cameramen.

Access to News Media

Precisely because the President's assassination was the ultimate in defiance of law it called for the ultimate in vindication of law. The law enforcement agencies, in permitting virtually unlimited access to the news media, made this impossible. Not only

would it have been virtually impossible to impanel a jury which had not formed its own views on those facts which might come before it, but much of the information released, such as statements by Mrs. Oswald, might have been legally inadmissible at trial.

It is ironic that the very publicity which had already made it virtually impossible for Oswald to be tried and convicted by a jury meeting existing constitutional standards of impartiality should, in the end, have made such trial unnecessary.

We cannot comfort ourselves with the notion that this could have happened only in Dallas. It is too frequently a feature of our process of criminal justice that it is regarded as a public carnival. And this reflects our general obsession that everybody has a right immediately to know and see everything, that reporters and TV cameras must be omnipresent, that justice must take a second place behind the public's immediate "right to be informed" about every detail of a crime.

Incompatible With Justice

For the fact is that justice is incompatible with the notion that police, prosecutors, attorneys, reporters and cameramen should have an unlimited right to conduct *ex parte* public trials in the press and on television.

As long as we adhere to that notion, and as long as our legislatures and courts are unwilling to protect the processes of justice, we must recognize that the lamentable behavior of the Dallas law enforcement agencies and of the communications media reflect a flaw in ourselves as a society.

Paul M. Bator, Richard R. Baxter, Charles Fried, Robert A. Gerard, Henry M. Hart, Jr., Louis L. Jaffe, James Vorenberg.

Cambridge, Mass., Nov. 27, 1963."

CONCLUSION

It is respectfully submitted that this petition for rehearing should be granted.

Respectfully submitted,

MICHAEL P. DIRENZO
Counsel for Petitioner,
Antonio Corallo.

Certificate of Counsel

I hereby respectfully certify that the foregoing petition for rehearing on behalf of petitioner Antonio Corallo is presented in good faith and not for delay. No stay of execution of petitioner's sentence of imprisonment has been sought in connection with said petition for rehearing, and petitioner has been serving his sentence since November 7, 1963. I further certify that the within petition for rehearing is restricted to the grounds specified in Rule 58 (2) of the Rules of this Court, i.e. "other substantial grounds available to petitioner although not previously presented".

MICHAEL P. DIRENZO,
Counsel for Petitioner,
Antonio Corallo.